

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3
4 LORI WAKEFIELD,)
)
5 Plaintiff,) 3:15-cv-01857-SI
)
6 vs.) April 11, 2019
)
7 VISALUS, INC.,) Portland, Oregon
)
8 Defendant.)

9
10
11 (Jury Trial - Volume 2)

12 TRANSCRIPT OF PROCEEDINGS

13 BEFORE THE HONORABLE MICHAEL H. SIMON

14 UNITED STATES DISTRICT COURT JUDGE
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APPEARANCES

FOR THE PLAINTIFF:

Greg Dovel
Simon C. Franzini
Julien A. Adams
Jonas B. Jacobson
Dovel & Luner, LLP
201 Santa Monica Boulevard, Suite 600
Santa Monica, CA 90401

Lily E. Hough
Edelson PC
123 Townsend Street, Suite 100
San Francisco, CA 94107

FOR THE DEFENDANT:

John Maston O'Neal
Quarles & Brady LLP
Two North Central Avenue
Phoenix, AZ 85004

Zachary S. Foster
Quarles & Brady LLP
101 E. Kennedy Boulevard, Suite 3400
Tampa, FL 33602

Nicholas H. Pyle
Miller Nash Graham & Dunn LLP
111 SW Fifth Avenue, Suite 3400
Portland, OR 97204

COURT REPORTER:

Dennis W. Apodaca, RDR, FCRR, CRR
United States District Courthouse
1000 SW Third Avenue, Room 301
Portland, OR 97204
(503) 326-8182

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1 (April 11, 2019)

2 P R O C E E D I N G S

3 (Open court; jury not present:)

4 THE COURT: All right. Good morning, everyone. We
5 are here without the jury, although, Mary, let's close the back
6 doors in case a juror jury walks by.

7 All right. I have received and I have read
8 defendant's motion to exclude plaintiff's Exhibits 36A, 36B,
9 36C, 64, and the attached Exhibit A, which is Docket 273 and
10 273-1. I have received plaintiff's opposition, which is docket
11 274, and I thank everyone for their analysis

12 Is there any further argument that either side wishes
13 to make at this time?

14 MR. FOSTER: Unless Your Honor would like to hear
15 anything more that I didn't cover in my brief, if you have any
16 specific questions, I think we've covered the issues that are
17 most pertinent from our perspective, which is prejudice and
18 hearsay. If Your Honor has any specific questions about
19 specific prejudice, I'm happy to offer more on that.

20 THE COURT: Anything further from plaintiff?

21 MR. DOVEL: Your Honor, I'll just comment for the
22 record that while we didn't attach a declaration to support
23 each of the facts, Mr. Davis is here and prepared to testify
24 about all the facts that were asserted about how we did
25 everything that's in that brief.

1 THE COURT: Well, I'm less concerned with how he did
2 it than with the argument that 64 is more than merely a summary
3 of defendant's exhibits, but also includes hearsay,
4 specifically by using the program -- what is it called?
5 SearchBug?

6 MR. DOVEL: Yes.

7 THE COURT: I have never heard of SearchBug before
8 this. I have heard of LexisNexis in my reading of other TCPA
9 cases, including the Krakauer case. I see there was some use
10 of LexisNexis by the experts there. More significantly, there
11 were experts there.

12 So would you get around the problem and the objection
13 raised by defendant that 64 is more than merely a summary of
14 defendant's records; that in order to accomplish what Mr. Davis
15 did in 64, he also had to apply a third-party set of
16 information; namely, this thing called SearchBug to identify
17 which calls are mobile or cellular and which are not. The
18 defendant objects that that is hearsay; namely, a listing or
19 database of what phones are mobile and what phones are
20 landline.

21 I do think that, No. 1, it is hearsay. No. 2, it is
22 the sort of hearsay that probably if we had an expert witness
23 might testify -- assuming you are right about what SearchBug is
24 or Mr. Davis is -- an expert witness might be able to opine
25 that SearchBug has a sufficient reliability; that it is the

1 sort of database that experts in the field identifying which
2 calls are mobile and which calls are landline telephone
3 generally rely upon, and that probably would be a vehicle to
4 make it admissible.

5 But I note that no party -- neither side here -- has
6 designated any expert witnesses. We don't have any expert
7 testimony. I do think that the question of whether or not
8 SearchBug is or is not sufficiently reliable to be used in a
9 case in federal court does require opinion testimony, expert
10 opinion testimony, and so I don't see how I can take judicial
11 notice of that fact. So 36C does appear to be based on a
12 document that -- or to include, as part of its foundation, a
13 document that is not admissible, at least not without expert
14 testimony.

15 What am I misunderstanding here?

16 MR. DOVEL: I think the thing you are
17 misunderstanding, Your Honor, it does not require an expert
18 opinion in order to lay the foundation that a database is
19 generally used by persons in a field. For example, it doesn't
20 take an expert opinion to lay the foundation that a telephone
21 directory is generally relied upon --

22 THE COURT: Agreed.

23 MR. DOVEL: -- or we could identify any other kind of
24 commercial compilation. Well, that's what SearchBug is.

25 THE COURT: How do I know that?

1 MR. DOVEL: Mr. Davis can testify about that.

2 THE COURT: Can Mr. Davis testify that SearchBug is
3 generally reliable?

4 MR. DOVEL: Yes.

5 THE COURT: But that's an opinion. And doesn't that
6 require expertise? Here is my point: In order to conclude
7 that SearchBug is generally reliable, that is an opinion. It
8 is not a lay opinion; it is an opinion. And we have to hear
9 from somebody with some expertise that I know the difference --
10 not me personally -- but the witness knows the difference
11 between what's reliable and what's not reliable, and in the
12 witness's expert opinion, this thing is reliable. Okay. Where
13 is the expert witness that says that?

14 MR. DOVEL: Your Honor, the actual fact that we have
15 to show is not that it is generally reliable. It is that it is
16 relied upon by the public or by persons in a field.

17 THE COURT: Let me say I agree with you, and so I'll
18 rephrase what I'm saying.

19 Where is the evidence that this is relied upon by the
20 general public or persons in the field of doing this? That
21 still is an opinion, and I don't think it is a lay opinion. If
22 I were to present to you "Judge Simon's database of what is a
23 mobile phone and what's not," and I have no expertise in this
24 field. If I were to say, "Well, if it ends in an odd number,
25 it is probably a cellular phone. If it ends in even number, it

1 is probably a landline." Everybody who knows the field will
2 say, "That's ridiculous. That's not reliable. No members of
3 the public generally rely on that type of criteria and experts
4 in the field don't rely on that type of criteria."

5 So we would need at least some type of qualified
6 expert to opine that this particular database of what's a
7 cellular number and what's a landline is the sort of thing that
8 is generally relied upon by the public or generally relied upon
9 by experts in the field, and that's what is missing.

10 MR. DOVEL: Your Honor, again, I think the actual
11 criteria is a little broader. It doesn't have to be relied
12 upon by an expert, just relied upon by people in a particular
13 profession. Mr. Davis has the personal knowledge based upon
14 his work in his field to state that, at least enough to make it
15 admissible. We don't even have to prove it definitively. It
16 is just enough that a jury could conclude that persons in the
17 field could reasonably rely upon this.

18 THE COURT: Let me tell you why I'm not accepting
19 that, and you can tell me why I'm looking at it incorrectly.

20 Mr. Davis, without expressing opinion, can certainly
21 tell us what he relies upon generally. That's personal
22 knowledge. But for him to tell us what people in the field
23 generally rely upon, he doesn't have personal knowledge of
24 that. That's his opinion. He may be able to tell us that he
25 knows five people -- Jane, Mary, Harry, Fred, and George -- and

1 they rely upon it. That's hearsay most likely, unless he has
2 observed them relying upon it. Most likely he has heard them
3 say that. So he only has personal knowledge of what he himself
4 relies upon.

5 An expert is allowed to give an opinion that is
6 beyond a lay opinion -- not counting 701 lay opinion. An
7 expert can give opinion testimony, at least within the
8 strictures of 702 and 703. So if Mr. Davis were to be
9 qualified as an expert, he could give an opinion that says that
10 people in the field generally rely upon this database. That's
11 his opinion. Maybe even the public relies upon this database.
12 That's his opinion.

13 But the problem is nobody, neither side, especially
14 the plaintiff, did not designate an expert, did not provide an
15 expert disclosure report, as is required by Rule 26, and so I'm
16 not going to receive a layperson's opinion about something that
17 requires expertise.

18 What am I misunderstanding?

19 MR. DOVEL: Your Honor, I don't think that that
20 hearsay exception requires an expert opinion. There is no case
21 that I'm aware of that has held that only an expert can do it.
22 It can be done by someone who has personal knowledge based upon
23 their work in the field, their interaction with others, their
24 own personal work in the field.

25 THE COURT: I'm not following you, because their own

1 personal work in the field will tell you what he relies on.

2 How does he know what other people rely upon?

3 MR. DOVEL: The question is not about what "other
4 people" necessarily, but he can do some of that as well. But
5 it is about what persons in a particular field or profession.
6 He knows as a person in that profession that he relies upon.
7 That is a basis from which we can infer that persons in the
8 field do it. In addition, Your Honor --

9 THE COURT: Why is that? All it is a basis for is
10 that he is in the field, and he does it.

11 MR. DOVEL: Yes. And from that we can infer that
12 persons in the field rely upon it. It is not definitive proof,
13 I agree. He could be cross-examined about it. But it is a
14 reasonable inference from those two facts, and that's typically
15 all that is done in these cases, Your Honor. It is not expert
16 opinion.

17 THE COURT: Some of the opinions that I have read,
18 including the Krakauer case, don't they have experts?

19 MR. DOVEL: Yes, Your Honor. But it is not true that
20 in every single case an expert comes in in order to get a
21 market compilation or a commercial compilation in evidence.

22 THE COURT: Let's be precise here. If it is just a
23 compilation from defendant's records, if it is adding up lines
24 and taking some lines away based upon what the lines say, like
25 if it says -- and I'm moderately sympathetic to plaintiff's

1 position on 36A and B. If you basically take the defendant's
2 list and say, "Here is the defendant's list, and I've totaled
3 up the various columns," that doesn't require expertise. If
4 you take defendant's list and you say, "I have totaled up all
5 of the columns, and I've subtracted the ones that say 'Inc.' or
6 'LLC,'" that doesn't require expertise.

7 If you take the defendant's data and you say, "I have
8 deleted all of the numbers that I have learned from another
9 database are mobile or cellular phones," or "I have separated
10 those out and given you a separate count," then I think we need
11 some expertise as to the reliability of that separate database
12 that has been used -- in your case SearchBug; in other cases
13 that I have seen where experts have opined it's LexisNexis --
14 and they say, "These separate programs are generally reliable.
15 They are relied upon by experts such as myself in the field,
16 and I'm making those adjustments."

17 That's what is missing from Mr. Davis' conclusions.

18 MR. DOVEL: Your Honor, if what he had done, for
19 example, say, "I'm just going to summarize the numbers of
20 people that are Portland residents," and he did it by taking
21 the phone numbers that are in the Portland telephone directory,
22 it requires no expertise.

23 THE COURT: I agree with that, because then what he
24 is doing is he is telling the jury, "I have taken the Portland
25 phone book" -- for whatever it is worth -- "and I am telling

1 you whether the number is or is not in the Portland phone
2 book." That's fine.

3 MR. DOVEL: What he has done here is, "I have taken
4 the line type list from SearchBug, a commercial database, and I
5 have seen which ones are mobile and which ones are not."

6 THE COURT: That's the additional step. If we just
7 were to present evidence to a jury that says, "This number is
8 in the Portland phone book; that number is not," whether that's
9 a sufficiently interesting or important or material legal point
10 is a different issue. If he were to say, "I have compared the
11 defendant's list with something called SearchBug, and this is
12 in SearchBug, and that's not in SearchBug," that may not
13 require expertise. That's counting.

14 But to then make the additional step and say, "Oh, by
15 the way, SearchBug is a reliable database that will tell us
16 whether or not a number is mobile or landline telephone,"
17 that's the link that I'm seeing requires expertise or some
18 other type of validation that I'm not seeing here.

19 MR. DOVEL: I understand, Your Honor. I don't want
20 to repeat myself. You have been very generous in giving me
21 time to argue it.

22 Your Honor, let me suggest this then: We would like
23 to move to have Mr. Davis offered as an expert solely for the
24 opinion that SearchBug is reliable. The basis for allowing us
25 to do this late, Your Honor, only after a few days ago did we

1 hear from ViSalus that we would need to carve out mobile from
2 residential. Throughout the entire preparation of the case,
3 including the class process, mobile and residential were lumped
4 together. That's how they provided it. In fact, in motion
5 papers before the Court on this issue back with the class
6 certification, we said we can do that if it is needed. Nobody
7 raised an objection.

8 When we were preparing the pretrial papers, they
9 said, "Listen, we are going to ask the jury a question: Is it
10 mobile or residential without carving them out?" Only when
11 they said, "Listen, we want to carve those out; we need a
12 separate verdict" does it become necessary to do that.

13 THE COURT: First of all, it is not necessarily
14 necessary if it turns out that you are right, which, by the
15 way, I have not made a decision on, but I'm going to let the
16 jury go in both directions.

17 Mr. Franzini asked me in an email, and I've agreed in
18 a tentative draft -- the latest draft of the verdict form -- to
19 ask the jury, on the first class question, combine it,
20 landlines and mobile phones. Were any of them violative of the
21 TCPA? If so, next question: How many? And that's the way you
22 phrased it. There, they're being combined.

23 If you are right that it is good enough to do it that
24 way, then, fine, you will get a jury number. I then, though --
25 I'm skeptical. I haven't made a final decision, but I'm

1 skeptical that that is legally sufficient because we've known
2 for months, if not more than a year, that one of the key issues
3 in the plaintiff's individual claim is, sure, she had a
4 landline in her home. Does that count as residential or
5 business?

6 That tells me that it may require a factual analysis
7 by a fact-finder -- here, a jury -- to determine whether a
8 particular landline in a phone is primarily residential, in
9 which case it is residential, or not, in which case it is not.
10 That's why I thought it probably is useful when the defendant
11 raised the objection that we should separate out mobile and
12 residential, it made sense to me because I'm somewhat skeptical
13 that the jury will have enough information to decide whether or
14 not the calls made to a home landline are or are not
15 residential, as I've announced in our legal discussions months
16 ago. Therefore, I thought it would be useful, since it doesn't
17 matter whether it is residential or business or a cell phone,
18 to get a separate question on how many were cell phones.

19 Now, the plaintiffs have made the argument, "No, it
20 doesn't matter. We want a combined total of residential
21 landlines or cell phones, and that's what we are going to ask
22 the jury for."

23 MR. DOVEL: My point is, Your Honor, only a few days
24 ago were we given notice that the defendants were taking the
25 position that the jury was going to be asked for a separate

1 mobile number. In light of that, there's zero prejudice to the
2 defendants if Mr. Davis testifies that SearchBug is a reliable
3 source.

4 THE COURT: Before I start speculating on what I
5 think the prejudice is, I will ask the defendant: Any
6 objection to letting Mr. Davis testify as an expert?

7 MR. FOSTER: Absolutely.

8 THE COURT: Tell me why.

9 MR. FOSTER: Expert deadline closed --

10 THE COURT: No. Tell me what the prejudice is.

11 MR. FOSTER: Your Honor, first of all, we have no
12 idea. We never had the opportunity to depose Mr. Davis. I
13 have no idea what he is going to say. I have no idea what his
14 qualifications are. On the witness list, he was disclosed as a
15 summary witness. Until this morning my impression of what
16 Mr. Davis was going to come do and would say, "Here is how I
17 tabulated a number from a data set."

18 Now, I will say, Your Honor, I disagree that 36A and
19 36B are mere tabulations. And I want to put a pin in that
20 later. But focusing on the expert nature, Your Honor, first of
21 all, plaintiff has known since plaintiff brought the case what
22 the elements of the TCPA are.

23 We raised this issue back in July, Your Honor, when
24 Judge Brown asked us to submit certain briefs on certain jury
25 instructions. One of the jury instructions that defendant

1 submitted was the plaintiff has to prove every element of their
2 claims at trial, and there was some discussion about whether
3 you could prove an element through a post-trial affidavit.

4 But specifically, Your Honor, in plaintiff's
5 response, they dropped a footnote and said, "Well, we could do
6 this post-trial affidavit, or we could just designate an
7 expert." I believe that's what Mr. Dovel is referring to.
8 They never asked to designate an expert. We would have
9 obviously objected then, at the point that those briefs were
10 filed. We were set to go in November, and we would have argued
11 that we were prejudiced because of proximity to trial.

12 Then knowing the issues they were facing with the
13 class element, they never designated an expert, and now the day
14 of trial, the day I'm prepared to cross-examine Mr. Davis on
15 what I thought was going to be a summary presentation, they
16 want to present him as an expert. Your Honor, that is textbook
17 prejudice.

18 THE COURT: Thank you, both. I have heard enough.
19 Here is what I'm going to do: I'm excluding 64 for inadequate
20 foundation regarding the reliability of SearchBug. I am
21 excluding 36C because it relies in part on evidence that is not
22 admissible. I will reserve any further comments or conclusions
23 regarding timeliness. I do have some concerns there, but I
24 don't need to address those, given that I think 64 relies upon,
25 in part, SearchBug, which does not have an adequate foundation

1 of reliability, which I do think requires expert testimony.
2 36C is based upon 64. If 64 is not admissible, 36C doesn't
3 come in as a summary under Rule 1006.

4 With respect to 36A and B, I'm going to overrule
5 defendant's objection on timeliness on those two. They have
6 come in a couple of days ago. I get your concern. But I do
7 understand your point where you "put a pin in it." I'm not
8 ruling that 36A and B are admissible. I want to hear
9 foundation testimony. If it really just does rely on the
10 defendant's database where certain things have been included or
11 excluded based upon undisputed information, that may be
12 sufficient for a foundation, but I'll reserve ruling on the
13 admissibility of 36A and B. Obviously I'm still reserving
14 ruling on 36 as well. I want to hear the foundation

15 MR. FOSTER: Your Honor, if I may just for the record
16 say 36A and 36B are a compilation of not just defendant's
17 documents. If it were a summary of defendant's documents,
18 which is "here what we included and here is what we did not
19 include," we would not have an objection, but unfortunately,
20 Your Honor, that's simply not --

21 THE COURT: What's your position of what you think
22 36A and B are?

23 MR. FOSTER: Well, I'll start with what I know 36 is,
24 because Mr. Franzini's email explained to me what 36 was back
25 in January. He provided me the underlying data used to create

1 36. 36 was based on Exhibits 38-1 through --

2 THE COURT: 405.

3 MR. FOSTER: 405. Those are the spreadsheets
4 identified in Mr. Gidley's affidavit. They took those
5 spreadsheets and created a database with those spreadsheets.
6 Then they took the KCC class list and ran it against that
7 database to pull only that information that related to the
8 class list, and then they used that pool to create a new
9 database. That database, they then queried for the remaining
10 responsive disposition codes, and they provided me with said
11 underlying database, because the summary is a summary of that
12 new database, not a summary of the compilations themselves.

13 Your Honor, I can't stress this enough: That is
14 4.1 million lines of data. I don't have whatever program they
15 used to run that. We have been doing essentially a manual
16 review of 4.1 million lines of data. We are not exaggerating.
17 I have spent dozens and dozens of hours wrapping my head around
18 what 36 is.

19 This Sunday, this last Sunday, I get 36A. I don't
20 get an explanation for how 36A was created. I don't get the
21 underlying databases that it is in fact summarizing. Again,
22 Your Honor, it is a different amount of final calls. The
23 spreadsheet says there are now only four -- there is a
24 10,000-call difference. If I don't have even the database that
25 they are summarizing, I don't know what's been included. I

1 don't know what has been excluded. There is no such
2 explanation.

3 Now, even if I had the database, Your Honor, there
4 would simply be not enough time for me to even prepare any kind
5 of cross, because Mr. Davis is going to go up on the stand and
6 say, "Your Honor" --

7 THE COURT: Mr. Foster, I understand what you are
8 saying. I will take it under advisement. I want to hear the
9 direct and cross of Mr. Davis on that issue before making final
10 decisions on 36A and B.

11 MR. FOSTER: Your Honor, just for the record, it is
12 our position that those databases that is the information that
13 is being summarized, so under 1006 it should have been provided
14 to us, or else it's just a summary, and we have no idea.

15 THE COURT: I understand. And you're welcome to ask
16 Mr. Davis why he didn't provide it to you and why he didn't
17 provide it to you sooner.

18 MR. FOSTER: Thank you, Your Honor.

19 THE COURT: I'm not making a ruling on 36A and B.

20 I will say for our court reporter at 8:46 there is
21 something in the rough transcript when Mr. O'Neal was referring
22 to "Exhibits 38-1 through," the rough transcripts reads
23 "4 or 5," and what he said, "405."

24 THE COURT REPORTER: Thank you.

25 THE COURT: All right. I will give you ten minutes

Opening Statement

1 to get your thoughts together, and then we will call in the
2 jury and do your opening statements.

3 (Recess.)

4 THE COURT: Good morning, members of the jury.

5 THE CLERK: Please be seated.

6 THE COURT: At this time we are going to hear opening
7 statements. We will start with counsel for the plaintiff,
8 followed by counsel for the defendant.

9 Mr. Jacobson, I understand you're doing the opening
10 statement.

11 MR. JACOBSON: Yes, Your Honor.

12 THE COURT: You may proceed whenever you wish.

13 MR. JACOBSON: Thank you.

14 Good morning. When companies make telemarketing
15 calls to people's home phones and their cell phones, those
16 calls cannot use recorded messages or any kind of artificial
17 robot voice. If companies do this, every single call is a
18 violation of federal law.

19 MR. O'NEAL: Objection, Your Honor.

20 THE COURT: Overruled.

21 MR. JACOBSON: Let me tell you what the evidence will
22 show is the story of what ViSalus did. It is 2012. ViSalus is
23 selling weight-loss products, like weight-loss shakes. It is a
24 multilevel marketing business. What that means is that
25 ViSalus sells its products to people who try to resell those to

Opening Statement

1 other people below them, who try to resell those to other
2 people below them, and so on.

3 ViSalus has a name for the people that buy products
4 from them that try to resell to others. It calls them
5 "promoters." The more promoters ViSalus has buying its
6 products to try to resell, the more money that ViSalus makes.
7 And when its promoters leave and quit, ViSalus makes less
8 money.

9 When promoters sign up with ViSalus, ViSalus collects
10 their home numbers and their cell phone numbers. In 2012, one
11 of the promoters that signs up with ViSalus is
12 Ms. Lori Wakefield. ViSalus takes her home number. Two months
13 later Ms. Wakefield quits ViSalus; ends her relationship with
14 them. After she quits, ViSalus keeps her home number. That
15 year, like every year, thousands of other promoters also quit
16 ViSalus and end their relationship with them. ViSalus keeps
17 their home phone numbers and their cell phone numbers.

18 When promoters leave, ViSalus makes less money. And
19 so in 2012 ViSalus comes up with a telemarketing strategy to
20 call up promoters and customers who stopped buying, who have
21 quit, and try to persuade them to come back and buy again.
22 ViSalus calls this its WinBack strategy, a telemarketing
23 strategy to win back people who have quit and get them to buy
24 products again.

25 Now, at first, ViSalus has live agents carry out its

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1 WinBack telemarketing strategy. Live agents manually dial the
2 phone numbers. And when people pick up, the live agents talk
3 to anyone they reach. But in 2013 ViSalus downsizes the
4 company, and it lays many of its employees off. After it
5 downsizes, it has just a handful of people assigned to actually
6 make these telemarketing calls.

7 So the next year, in 2014, ViSalus changes how it
8 makes its telemarketing calls. It buys a computer system
9 called the POM machine -- P-O-M -- the POM machine. The POM
10 machine is a computer for making automatic phone calls and
11 delivering prerecorded promotional messages.

12 Using the POM machine, ViSalus makes two kinds of
13 automatic phone calls that use prerecorded messages. First, it
14 makes what ViSalus calls Voice Cast calls. These are automatic
15 calls that deliver a prerecorded recorded message. They sound
16 like this: "Hey, this is Jeremy from ViSalus. I know you are
17 not with us anymore, but I just wanted to let you know if you
18 want to come back and buy another product kit from us, you get
19 50 percent off."

20 The second kind of recorded message that the POM
21 machine deliveries is called a Press 1 call. When a person or
22 answering machine picks up, this plays a recorded message that
23 sounds like, "This is an important message from ViSalus.
24 Press 1 to connect to a live agent." When you get a Press 1
25 call, it is possible to get to a live agent, but you have to

Opening Statement

1 listen to a recorded Press 1 message first.

2 To use the POM machine, ViSalus creates what it calls
3 "contact lists." A contact list is an electronic list of tens
4 of thousands of phone numbers, home phone numbers, cell phone
5 numbers. It is an Excel spreadsheet. But if you print it out,
6 it is as thick as a phone book. ViSalus feeds these contact
7 lists into the POM machine, and within a matter of days the POM
8 machine can make automatic calls to tens of thousands of people
9 and deliver prerecorded messages.

10 ViSalus uses the POM machine to carry out its WinBack
11 telemarketing strategy to win back promoters and customers who
12 have quit buying. Before ViSalus had the POM machine, a live
13 agent was calling people up and making live agent call to
14 people. An agent could make a maximum of a hundred calls a day
15 working full-time. With the POM machine, it can call tens of
16 thousands of people and deliver prerecorded messages with a
17 click of a button.

18 The POM machine targets ex-promoters and former
19 customers. One of the former promoters targeted by the POM
20 machine was Lori Wakefield. It has been three years since she
21 quit ViSalus, but in April of 2015 the POM machine calls her
22 five times. Ms. Wakefield is not the only former promoter and
23 customer targeted by the POM machine. In a period of 16 months
24 the POM machine calls 800,000 people in the United States. It
25 calls some people over and over and over. It calls some people

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1 more than 20 times; more than 30 times. It calls some people
2 more than 50 times. Using the POM machine, in 16 months
3 ViSalus makes 4,059,656 telemarketing calls designed to deliver
4 prerecorded messages.

5 We are suing ViSalus. We are suing ViSalus because
6 ViSalus violated the federal law that prohibits calling home
7 phones and cell phones and making telemarketing calls that
8 deliver prerecorded messages. We are suing ViSalus on behalf
9 of a class of more than 800,000 people targeted by the POM
10 machine, and we have here Lori Wakefield, the representative of
11 all of those people.

12 Now, before we brought this lawsuit to trial and
13 brought it to you, we had to check three things. Let me tell
14 you what the evidence will show on those three things: First,
15 if you are making a telemarketing call to a home phone and a
16 cell phone, and you're only using a live agent, you don't
17 deliver any kind of prerecorded message whatsoever, that is
18 legal. If you are using a recorded message, and it is not a
19 telemarketing call, that is also legal. So we had to identify
20 the calls made by ViSalus that were telemarketing calls that
21 used recorded messages.

22 Let me tell you what the evidence will show. You
23 will learn that ViSalus had many different kinds of calling
24 campaigns running. A calling campaign is just a name for a set
25 of phone calls made for a specific purpose. For example, every

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1 month ViSalus had a calling campaign where it would call up
2 people who tried to place an order and had their credit card
3 declined.

4 You will learn that ViSalus ran nearly 2,000
5 different calling campaigns. We identified the calling
6 campaigns that were telemarketing campaigns that used
7 prerecorded messages. You will see that these campaigns were
8 identified in a sworn statement from one of ViSalus's own
9 employees, its compliance analyst, Mr. Scott Gidley.

10 What Mr. Gidley did was he looked at all of the
11 calling campaigns that ViSalus ran, and he identified 406
12 calling campaigns that were marketing campaigns that used
13 prerecorded messages. These are the 406 calling campaigns that
14 we will present to you; not any campaigns that used live agents
15 only with no prerecorded messages; not any campaigns that
16 weren't for telemarketing. You will see evidence that these
17 406 campaigns were designed to deliver only prerecorded
18 messages. For these 406 campaigns there was no live-agent-only
19 strategy.

20 Let me show you a fact that both sides have agreed is
21 true. "With POM, ViSalus used two campaign strategies:
22 Press 1 calls (where a prerecorded or artificial voice
23 instructed customers to press 1 to be connected to a live
24 person now) and Voice Casting calls (where an audio clip played
25 a prerecorded call-back message)

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1 "With the POM machine, ViSalus used two strategies:
2 Press 1 calls, where it used a prerecorded message before you
3 get to a live agent; and Voice Casting calls, where it was only
4 a recorded message with a call-back number."

5 You will not see any document from ViSalus -- no
6 internal memo, no email, no notes -- that show for these 406
7 telemarketing campaigns that we have identified they ever used
8 any kind of live-agent only strategy, and you'll learn there's
9 a reason why.

10 After ViSalus downsized the company and laid people
11 off, it was down to only a handful of employees who could make
12 telemarketing calls. ViSalus's own witnesses are going to
13 admit to you that it was simply not possible for this handful
14 of employees to call up to make more than 4 million phone calls
15 in a period of 16 months.

16 Instead, what they did is they used the POM machine
17 to automatically make the calls and send out prerecorded
18 messages and then wait to see who pressed 1 to connect to them;
19 who called back after getting a prerecorded Voice Cast message.
20 This way a handful of employees could spend their limited time
21 only talking to the people who were most interested in buying
22 ViSalus products, the few people that heard a prerecorded
23 message and pressed 1 who were actually called back.

24 This was important because you'll learn that most of
25 this time those employees weren't even dealing with outbound

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1 telemarketing calls. They spent most of their time dealing
2 with problems where credit cards were declined on orders and
3 had little time to actually talk to people on the phone. The
4 POM machine and recorded messages is what solved that problem
5 for ViSalus.

6 You will hear from Ms. Lori Wakefield, who got five
7 calls from the POM machine. She will tell you she got Press 1
8 calls, and in one of those calls she did press 1 to connect to
9 the ViSalus agent. She told that agent, "Stop calling me."
10 They didn't stop. They kept calling her.

11 She will tell you that she got some calls where, when
12 she got the call, she thought it may have been a live person on
13 the other end of the line when she picked up. She said, "Don't
14 call me," and she hung up. But you will get to hear examples
15 of what these ViSalus Voice Cast recording messages sound like.
16 And you will see the way these things are designed that it kind
17 of sounds like it is a live person. This is so people don't
18 hang up right away, and they listen to some of the messages
19 before hanging up the phone.

20 You'll hear ViSalus -- you'll see testimony from
21 Scott Gidley, the ViSalus employee, admitting that ViSalus
22 targeted Ms. Wakefield with Voice Cast calls, these recorded
23 calls, designed to sound like a live person. And we will show
24 you ViSalus's own internal records that show you the POM
25 machine made five calls to Ms. Wakefield that used recorded

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1 messages. The evidence will show you more likely than not all
2 five of those calls to Ms. Wakefield were POM machine calls
3 that used recorded messages.

4 Let me tell you the second thing that we had to check
5 before we brought this case to you. It is only illegal to use
6 a prerecorded message call to a home phone or a cell phone. If
7 you are calling up business phones, that is okay. So we had to
8 identify the calls ViSalus made with the POM machine to home
9 phones and cell phones.

10 Here is what the evidence will show on that. The way
11 that ViSalus got these numbers to load into its contact list
12 and feed into the POM machine, it got them from applications
13 that promoters filled out when they joined ViSalus. Those
14 applications asked for two types of phone numbers -- home and
15 cell phone. There was a space on that application where if you
16 were a business or associated with a business, you could write
17 in the business name and fill out a separate form where you
18 could put a business number. We went through ViSalus's records
19 and pulled out the businesses, and what's left? Calls made on
20 the POM machine made to home phones and cell phones.

21 There is something we had to check that's unique to
22 Ms. Wakefield. You'll learn that around the time that ViSalus
23 called her, she had a daycare business at her house, where it
24 was just her taking care of three to four kids whose parents
25 were firefighters like her husband. You will learn that if you

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1 have a residential landline and you use it primarily for
2 business, mostly for business calls, then that residential
3 landline is really a business line.

4 If you only use it for some business calls, and it is
5 mostly for personal calls, it is not a business line. You will
6 see overwhelming evidence that Ms. Wakefield used her home
7 phone almost all of the time for personal calls and very rarely
8 for a daycare business.

9 We will show you her phone records for the
10 three-month period during which ViSalus called her. You will
11 see that during that time she got 301 calls on her home phone.
12 Two of those calls related to her daycare. 299 were personal
13 calls. And that's typical with how she used her home phone.

14 You will learn that the way her daycare parents got
15 in touch with her was sending text messages to her cell phone
16 or talking to her when they picked up the kids when they got
17 off work. The evidence will show that Ms. Wakefield's phone
18 was primarily for personal calls, which means it was a home
19 line, not a business line.

20 Let me tell you the third thing that we had to check
21 before we brought this case to you. When you're making calls
22 designed to use prerecorded messages, it is only illegal if the
23 message actually begins to play, at least a little bit. So we
24 had to identify the calls that ViSalus made where the recorded
25 message actually began to play. You'll see we did this with

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1 ViSalus's own internal records. The way the POM machine works
2 is if a person or an answering machine picks up, the POM
3 machine detects it, and the recorded message starts to play.

4 You'll see ViSalus's contact list, these lists of
5 tens of thousands of phone numbers connected to the POM
6 machine. In that list ViSalus kept track of what happened
7 after they placed the call. For most of these calls ViSalus
8 kept track of whether a person or an answering machine picked
9 up, and they put special codes into their spreadsheets that
10 tell us that.

11 We went through these spreadsheets, and we counted up
12 the number of POM machine calls that a person or answering
13 machine picked up, and that tells us the number of illegal
14 calls that ViSalus made.

15 Using the POM machine, ViSalus made at least
16 1,999,603 calls before that recorded message began to play.
17 You will learn that this greatly understates how many illegal
18 calls they made. For nearly 2 million of their calls they
19 didn't keep track whether a person or an answering machine
20 picked up.

21 The evidence will show you, more likely than not, for
22 more than a million of those calls a person or answering
23 machine probably did pick up, which means the truth is, more
24 likely than not, ViSalus made over 3 million illegal calls
25 where a person or answering machine picked up, but they

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1 certainly made 1,999,683.

2 Let's talk about consent. For it to be legal for you
3 to call a home phone or a cell phone and use a prerecorded
4 message, you've got to get someone to give you their written
5 consent specifically to use recorded messages. It is not
6 enough that someone just gives you their phone number. It is
7 not enough if someone just says, "It's okay to call me." It
8 has to be written consent to get robocalls with recorded
9 messages.

10 ViSalus has admitted it did not have consent or
11 permission to call a single one of the more than 800,000 people
12 targeted by the POM machine. Let me say that again. They
13 admit they didn't have consent or permission from a single
14 person they targeted on the machine.

15 And that brings me to the last thing that I want to
16 talk with you about today: Accountability. You won't hear
17 ViSalus take a shred of it. You will learn that instead of
18 taking accountability, they tried to cover up what they did
19 with the POM machine. When you have all of the evidence at the
20 end of this case, you'll see that this is the kind of case
21 where the only thing that's going to make ViSalus take
22 accountability for the millions of illegal calls that it made
23 is a jury like you holding them accountable.

24 Thank you for your attention

25 THE COURT: Thank you, Mr. Jacobson.

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1 At this time I will invite an attorney for defendant
2 to deliver defendant's opening statement. Mr. O'Neal.

3 MR. O'NEAL: Thank you, Your Honor.

4 Good morning, everyone. You've all got your
5 souvenirs, I see.

6 Let me start with the basic premise: Plaintiff bears
7 the burden of proof, and they won't be able to prove that
8 ViSalus played prerecorded messages on telemarketing calls to
9 mobile or residential devices. They won't be able to make that
10 burden. The reason why they won't be able to make that burden
11 is because ViSalus didn't do it.

12 The evidence is going to show that ViSalus's business
13 depends on personal relationships. That is, it needs to put
14 live people together with live people. Messages on answering
15 machines or into the etheria (phonetic) doesn't work. ViSalus
16 is built on personal relationships.

17 So when it makes calls, its entire campaign strategy
18 is to make sure that a live person in its business is connected
19 with a live person on the other end. And that's what POM did.
20 It was a program that allowed for calls that didn't reach a
21 live person to be filtered, to be hung up, and then move on to
22 a next call until a person picked up.

23 This is why ViSalus didn't violate the statute in the
24 way that the plaintiff says they did, because it didn't use
25 prerecorded messages on telemarketing calls, which is defined

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1 as selling products or services -- selling products or
2 services -- and playing prerecorded messages.

3 So let's take a step back and first talk about what
4 is ViSalus. Well, it's a company that was founded 14 years ago
5 by three people, and it is a lifestyle and healthy products
6 company. What it does is it sells meal replacements, shakes,
7 healthy snacks, and energy drinks. Its signature product is
8 something that's called Body by Vi Challenge. You will hear
9 evidence about it. Sometimes it is just shorthanded and called
10 "The Challenge." Under The Challenge, the idea was that
11 ViSalus's customers would go on a 90-day program under which
12 they would use ViSalus's products to achieve their personal
13 weight loss or fitness goals.

14 However, ViSalus is different than a lot of companies
15 that you might be familiar with, because ViSalus is what is
16 known as a network marketing company, which is important to
17 that personal contact that I mentioned before. These network
18 marketing companies are sometimes called as multilevel
19 marketing. If you haven't heard that name before, just think
20 of Avon, Pampered Chef, or Mary Kay. That's the model that
21 those companies use.

22 Now, in a traditional corporation, they have their
23 own internal sales force. But when you have a network
24 marketing company, what they do is they have a large external
25 sales force of independent business owners. They are

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1 entrepreneurs. Sometimes they are husband-and-wife teams.
2 Sometimes they are LLCs and corporations. Sometimes they're
3 just individuals that want to start their own home business.
4 But they are their own business, and what they do is they go
5 out and market and sell ViSalus's products. You will see in
6 the stipulation that they are independent contractors. They
7 are not employees of ViSalus.

8 So what ViSalus does is it trains and educates the
9 promoters on its products and what they do. Then the promoters
10 go out and sell the products to the customers. And the
11 promoters do sign up with ViSalus; enter into contracts to do a
12 business relationship. As part of that business relationship,
13 they exchange information with one another about how they are
14 supposed to communicate. They write down email and the number
15 that they are supposed to talk to one another at. That's what
16 the promoters fill out, and those are the numbers that go to
17 ViSalus so they have them in their files for purposes of
18 contacting the promoters.

19 Now, because ViSalus promoters are working throughout
20 the world, including throughout North America, ViSalus has to
21 have a communication strategy to make sure that they talk to
22 them. It is not like they have one big headquarters, again,
23 like a corporation, where all of the sales force is under one
24 roof. So what ViSalus does is it uses email, it uses social
25 media, and it uses good old-fashioned calls. That's what it

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1 does, which is what, by the way, promoters sign up for, because
2 they fill it out on the forms when they become promoters.

3 So let's go back to 2013 and 2012. Now, around that
4 time ViSalus had what we will just call the support team. It's
5 a group of folks working in ViSalus's offices in Troy,
6 Michigan, that were standing by the phones. They would take
7 telephone calls as they would come in. They would manually
8 dial numbers out to talk to promoters. They would call
9 customers. Again, very consistent with what I was saying,
10 person-to-person live contact.

11 Well, what happened is that the company starts to
12 grow. As a result of that, what happens is customers who have
13 placed automatic monthly orders with ViSalus for their
14 products, their credit cards sometimes expire or their credit
15 cards sometimes get declined. And this is for products that
16 they've already ordered.

17 So what ViSalus said is, "Hey, listen. We want to
18 reach out to these people who have had their credit cards
19 declined and let them know that that product you've already
20 ordered, you can't pay for it, because your credit card has
21 expired or because it was declined."

22 So this support group had a smaller group in it
23 called "The Outbound Group," and that's what those folks did.
24 They started dialing numbers to customers, saying, "Listen, the
25 products that you've already ordered, we are going to give you

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1 this as a courtesy and let you know information, your credit
2 card didn't work."

3 Well, ViSalus started to grow. It started to get
4 bigger. And it needed to modernize and improve its
5 communication. So what it did is it bought a computer system
6 and a phone system called Avaya. The best way you can describe
7 it is it's a bunch of phones that can be put into the office,
8 but it also has a software component and the ability to upgrade
9 and add additions onto it.

10 So as ViSalus's business grew and there became more
11 promoters and more customers, ViSalus added a feature in the
12 later part of 2014. It is a nifty piece of software called
13 Progressive (sic.) Outreach Manager, also called POM. So
14 what's POM, and what does it do? Well, you are going to hear a
15 lot about it, but it is not how the plaintiff characterized it.
16 It is a system that actually facilitates ViSalus's core
17 business strategy, which is to make sure that live people talk
18 to live people.

19 So what POM does is it dials numbers to the promoters
20 and to the customers, and it can detect when a live person
21 picks up the phone. That's what the software does. Then when
22 a live person picks up, the POM does what's known as a live
23 connect, or think of it like a patch, when the two circuits
24 come together. POM will then take that person who picks up the
25 phone, who has already signed up to be a promoter or customer,

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1 because, remember, ViSalus isn't calling strangers on cold
2 calls. That's not what they are doing. They are calling their
3 customers, and they are calling their promoters.

4 That person, who is a customer or promoter, is then
5 connected to an agent, which is in ViSalus's offices, and they
6 then talk to one another -- again, live connect. Live connect.

7 Now, the other thing that the POM does is twofold:
8 No. 2, it can also tell when a live person doesn't pick up. It
9 can tell when it's a busy signal. It can tell when it's a
10 wrong number. It can tell a lot of things. What the POM
11 system did is it made these telephone communications more
12 efficient, because the POM system would just simply hang up.
13 Then it would move on to the next number and call until the
14 list and the calls hit someone who was actually live, and then
15 it would patch in.

16 And the POM system had a third piece, which allowed
17 it to dial these numbers more efficiently than it would if you
18 had a person sitting in front of a phone pushing the numbers.
19 So, again, the concept is let's facilitate live connect.

20 You heard counsel talk about codes and disposition
21 codes, and that's right. The POM system also had the ability
22 that when a call was made, to assign a code as to what happens
23 as a result of that call. So, for example, if the number was
24 busy, it would say busy. If the number said it was bad, then
25 it would be bad. And you'll see manuals for the Avaya system,

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1 particularly talking about these disposition codes and what
2 they mean. What you will not see in that manual is any
3 disposition code "a message played/prerecorded message
4 delivered." It is not there. It is not there.

5 So what happened? Well, in 2014 and 2015, ViSalus
6 started to engage in calling campaigns using the POM system.
7 So it was using the POM system to call about credit card
8 declines. It was using the POM system to call about seminars
9 and national sales meetings. It was using the POM system to
10 call promoters, who they had a business relationship with, to
11 tell them about new products and special pricing that can be
12 passed on to the promoters' customers.

13 It also used the POM system for WinBack campaigns,
14 and WinBack campaigns is just what the name says: Promoters,
15 who had maybe gone inactive, weren't as active as they were in
16 the past, of course, ViSalus was interested in getting them
17 back, because the bigger sales force that ViSalus has, then the
18 better the company is going to do. And by the way, the better
19 the promoters are going to do, because that's how they get
20 paid. The promoters make commissions based off of the sales of
21 products that the promoters make to ViSalus's customers.
22 That's what network marketing or multilevel marketing does.

23 So we've got these campaigns in '14 and '15 -- credit
24 card declines; WinBack is asking promoters to come back -- not
25 a sale of a product or a good or investment. It is not what it

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1 is. A WinBack is, "Hey, we basically want to bring you back on
2 the team." That's not telemarketing. So these calls were
3 done, and they are successful. The whole idea is let's put
4 live people together talking to live people.

5 Now, the evidence is going to show, as I said before,
6 ViSalus didn't make blast cold calling. That's not what they
7 did. The evidence is going to show that they didn't use cheap
8 software to send out telemarketing messages. If they wanted to
9 do that, they wouldn't have to spend the money and get a fancy
10 system like they did when they got Avaya and POM. Again, the
11 whole idea is live person to live person.

12 Plaintiff isn't going to be able to prove with the
13 evidence that they put in front of you that somehow messages
14 were played to everyone of those calls; everyone of those
15 people that they just identified. What they are going to try
16 to do is string together a little of this, string together a
17 little of that, put a little sprinkle on something here, and
18 then say, "Hey, maybe, guys, let's just jump to the
19 conclusion." But the evidence isn't going to show that. It is
20 not going to show that.

21 As part of that, you know what the plaintiff has
22 done? They've seized onto two things which we stipulated to,
23 and they've twisted it into something different than it is.
24 Let's talk about those two things, Voice Casting and Press 1.
25 Counsel showed you a portion of the stipulation in which

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1 Voice Casting is mentioned. He would suggest that those were
2 the only two campaigns that were run. It's not. It's not.
3 And that's not what the stipulation says.

4 Okay. What Voice Casting was was the use of a
5 message in order to tell people that their credit cards were
6 declined. If you look at the stipulation, which you are going
7 to get at the close of this case, you will see that the
8 paragraph that counsel quoted actually has at the end an
9 exhibit. It's Exhibit B. Exhibit B is a portion of deposition
10 testimony by a former ViSalus person who worked in the call
11 center.

12 What that deposition testimony says is that
13 Voice Casting was the use of message for telling people about
14 credit card expirations and declines. That's what it says, and
15 that's what that stipulation means.

16 There isn't any evidence to show that Voice Casting
17 was used in the broad, sweeping manner that plaintiff would
18 have you believe. They've grabbed something, and they've blown
19 it up in a way that can't be justified by the evidence.

20 Now, let's talk about Press 1. What is Press 1? It
21 was described accurately. It is the use of a voice when a call
22 is made, "Hey, if you want to talk to an operator or if you
23 would like to speak to someone, press 1," and that's in the
24 Avaya manual. It's there.

25 However, ViSalus didn't use Press 1 until the later,

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1 near-end part of 2015. It just didn't even know how to do it.
2 So the vast majority of the calling campaigns and the
3 spreadsheets and everything else that the plaintiff is pointing
4 to all happened months before the time that Press 1 was first
5 used. So Press 1 couldn't be used for those campaigns.

6 As a matter of fact, the calls that the plaintiff
7 claims that she got, which were five, were also in April 2015,
8 months before Press 1 could be used. And you're not going to
9 hear any evidence in this case to suggest that Press 1 was used
10 at any time prior thereto. Again, grabbing ahold of something
11 and stretching far out.

12 All right. We have also heard about audio clips.
13 There are audio clips. You are probably going to hear them.
14 But listen to them real close when they come into evidence,
15 because what you are going to hear is that the vast majority of
16 those audio clips is not the sale of products or goods or
17 services.

18 What those audio clips say is something like, "Hey,
19 guys. We are having national sales training out in Tampa. We
20 would really like you to join us so you can learn more and how
21 to be a more effective promoter and seller," or some variation
22 of that, or "we've got some organization event going on; we
23 would like you to come out." That's not a telemarketing call.
24 That's not a sale of products or goods and services.

25 You are also going to hear some messages, which have

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1 some voices on them, and you'll hear that those are high-level
2 promoters; high-level promoters called "ambassadors." Those
3 ambassadors have large numbers of clients, large number of
4 customers, and they also have a large number of people under
5 their sales network who are also working for them.

6 What those messages are are for the use of the
7 ambassadors to reach out to their sales force. That's not
8 ViSalus. Those are the ambassadors and the independent
9 contractors, as said in the stipulation, that are reaching out
10 to their sales force. Perhaps most importantly, and I don't
11 want to lose sight of this, they are not going to prove to you
12 that those messages were played the millions of times that the
13 plaintiff asserts that they were.

14 The only evidence that comes in that those messages
15 were actually played is the only testimony from Ms. Wakefield
16 about five calls that happened in April. There is no other
17 evidence that would otherwise justify or support the
18 broad-sweeping statement that plaintiff otherwise said that
19 this case is about. It's just not there.

20 So before we end, let's chat about Ms. Wakefield.
21 She is here in her role as a class representative. She got
22 five calls from ViSalus in April of 2015. I believe the
23 evidence is going to show that those calls were in fact live
24 persons. I believe the evidence is going to show that, if she
25 tells the truth, that two of the calls that she asserts under

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1 which Press 1 or some message was played, that they happened
2 when Press 1 wasn't used by ViSalus.

3 And then No. 2, the call got cut off, so she can't
4 say one way or the other about whether or not it was a
5 telemarketing call for purposes of the sale of goods or
6 services, or whether it could have been somebody calling back
7 saying, "Hey, did you or your husband say that you didn't want
8 a call back? Both of you are on our number, and we need to
9 confirm it." She couldn't hear it and couldn't tell one way or
10 the other.

11 You will also hear that she did run a business out of
12 her house. It was a daycare business. But that's not the only
13 thing. She had held out to ViSalus that she used her home for
14 her ViSalus promotership. Now, it had been canceled for two
15 years, but ViSalus wanted to reengage her as a WinBack call.
16 She said no, and ViSalus stopped. There are no more calls
17 other than those found in 2015.

18 So, ladies and gentlemen, at the end of this case
19 what I'm going to tell you is that the plaintiff, again, has
20 tried to stitch together a number of things and then asked you
21 to make a great, big leap of logic. But what they need to do
22 as part of their case is make sure that the line goes dot to
23 dot to dot to dot on a scale of millions of calls to hundreds
24 of thousands of people. That's the burden that they bear --
25 not just one element of a claim, not just two, but all of them.

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1 Connect the dot, connect the dot, connect the dot with evidence
2 that they have. And they don't.

3 It all comes back to this live connect, ladies and
4 gentlemen. That's the reason why at the end of this case I'm
5 going to ask you to return a verdict in favor of ViSalus.

6 Thank you.

7 THE COURT: Thank you, Mr. O'Neal.

8 At this time I will invite the plaintiff to call the
9 first witness.

10 By the way, do you want the podium left where it is,
11 or do you want Mary to move it?

12 MR. FRANZINI: It is fine where it is, Your Honor.

13 THE COURT: All right. The plaintiff may call its
14 first witness.

15 MR. FRANZINI: The plaintiff calls Mr. Lance Eves,
16 the COO of Molalla Communications.

17 Your Honor, might I hand up a binder?

18 THE COURT: You may.

19 (The witness was duly sworn.)

20 THE CLERK: Would you please state your name for the
21 record, spelling your last.

22 THE WITNESS: My name is Lance Eves. E-V-E-S.

23 THE COURT: Whenever you are ready, Mr. Franzini, you
24 may proceed.

25 MR. FRANZINI: Thank you, Your Honor. One moment.

L. Eves - D

1 THE COURT: Take your time.

2 DIRECT EXAMINATION

3 BY MR. FRANZINI:

4 Q Mr. Eves, good morning.

5 A Good morning.

6 Q Thank you for being with us here today.

7 A Uh-huh.

8 Q Could you please introduce yourself to the jury.

9 A My name is Lance Eves. I'm the Chief Operations Officer
10 for Molalla Communications in Molalla, Oregon.

11 Q Mr. Eves, I am going to ask you to slow your pace a little
12 bit so the court reporter can take down what you are saying.

13 Sir, what are you here to testify about today?

14 A I'm here to testify about the telephone records for
15 Ms. Wakefield.

16 Q You have a binder in front of you. Will you please turn
17 to Exhibit 2 in the binder.

18 A Okay.

19 Q Sir, I'm showing you a document that is titled
20 "Verification" and has some pages with columns after it.

21 Do you recognize this document?

22 A Yes, I do.

23 Q Tell the jury, what are we looking at here?

24 A What we are looking at here is the request for
25 verification of call records. These are call records pulled

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1 from our telephone records from our telephone switch that
2 originated or terminated from the phone number of
3 (503)829-7628, which would be Ms. Wakefield's number.

4 JUROR: Are we supposed to see that on the screen?

5 THE COURT: Great question. The answer technically
6 is, no, not yet. Thank you for asking that.

7 Here is the way it works: If an exhibit is received
8 in evidence, then it will be on your screen. Until it is
9 received in evidence, the lawyers ask some questions about it
10 to lay a foundation. That's what he is doing now. My guess is
11 really soon Mr. Franzini is going to say something like, "We
12 offer Exhibit 2 in evidence." I'm then going to turn to the
13 defense counsel. If they object, I'll make a ruling. If they
14 say "no objection," I'll say "Exhibit 2 is received," and at
15 that point it will pop up on your screen.

16 Okay. Mr. Franzini.

17 MR. FRANZINI: Thank you, Your Honor.

18 BY MR. FRANZINI:

19 Q Before I do that, Mr. Eves, you mentioned "we" and
20 "Molalla Communications." Can you tell the jury what Molalla
21 Communications is?

22 A Yes. Molalla Communications is a landline telephone and
23 broadband company that serve the area of Molalla and Mulino,
24 Oregon.

25 MR. FRANZINI: Thank you, Mr. Eves.

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1 Your Honor, plaintiff moves Plaintiff's Exhibit 2
2 into evidence.

3 THE COURT: Any objection from defendant?

4 MR. O'NEAL: No objection.

5 THE COURT: Exhibit 2 is received, and you may show
6 it to the jury.

7 MR. FRANZINI: Thank you, Your Honor.

8 THE COURT: Now it should be on your screen. Am I
9 correct? It is? Very good.

10 BY MR. FRANZINI:

11 Q Mr. Eves, now the jury can see the document in front of
12 you. The first page is titled "Verification"?

13 A Yes.

14 Q Then it talks about a phone number?

15 A Yes.

16 Q I am going to highlight it. Do you know who this phone
17 number is registered to?

18 A According to our records, it's registered to
19 Lori Wakefield.

20 Q And is this phone number a landline or a cell phone?

21 A It is a landline telephone.

22 Q How do you know that?

23 A We will only provide landline service, and so in that case
24 that's the only thing it could be.

25 Q Is this telephone line registered as a business line or a

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1 residential line?

2 A This phone number is registered as a residential telephone
3 line.

4 Q And how do you know that, sir?

5 A According to our systems -- our billing system -- it was
6 signed up for and registered as a residential line, and that's
7 what we bill for is a residential line.

8 Q Now, you mentioned you "bill for" -- let me take a step
9 back.

10 Sir, could you please turn to Exhibit 4 in your
11 binder?

12 A Yes.

13 Q Do you recognize Exhibit 4?

14 A Yes, I do.

15 Q What is Exhibit 4?

16 A Exhibit 4 is a service bill from Molalla Communications
17 for service for Lori Wakefield.

18 MR. FRANZINI: Your Honor, plaintiff moves Exhibit 4
19 into evidence.

20 THE COURT: Any objection?

21 MR. O'NEAL: No objection.

22 THE COURT: Exhibit 4 is received in evidence.

23 BY MR. FRANZINI:

24 Q Mr. Eves, I've put it on the screen now. Is this the
25 phone bill that you've identified as Ms. Wakefield's phone

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1 bill?

2 A Yes, it is.

3 Q Does the phone bill have the phone number for this phone
4 bill on it?

5 A Yes.

6 Q Could you read the phone number on the phone bill.

7 A The phone number is (503)829-7628.

8 Q Is that the same phone number that was listed on the
9 Molalla Communications phone records that we just looked at?

10 A Yes, it is.

11 Q Now, does Plaintiff's Exhibit 4 -- does Plaintiff's
12 Exhibit 4 say -- can you tell, based on this, whether the phone
13 number is registered as a residential line or as a business
14 line?

15 A Yes, I can.

16 Q Where is that, sir?

17 A It's actually in two different places. The account number
18 at the top, the right-hand top of the first page, is prefixed
19 with an "RES." If it was a business line, it would be prefixed
20 with a "BUS."

21 Q Is that right here on the screen, sir?

22 A Yes, it is.

23 Q On page 1 of Exhibit 4?

24 A Yes.

25 Q You mentioned that it is also found in a second place?

L. Eves - D

1 A It also would be on page 4 of the phone bill. The service
2 under "local service" shows "residential access line."

3 Q Is that shown right here, sir?

4 A Yes.

5 Q What does "residential access line" mean?

6 A A residential access line is an access line that was
7 signed up for by an individual or individuals and registered as
8 a home phone service.

9 Q Right under "residential access line," there is a
10 statement that says "non-listed number." What does that mean?

11 A A non-listed number is a number that is not published in
12 any directory. So we suppress that information and don't share
13 or provide it to telephone directories, White Pages, any sort
14 of listing services.

15 Q So if a number is a non-listed number, will that be in the
16 Molalla phone book?

17 A No, it will not.

18 Q Sir, how big is the Molalla phone book, by the way? Show
19 the jury with your hand.

20 A It is about that big.

21 Q For the record, it shows it is about an inch?

22 A Yes.

23 Q Now, sir, I'm going to zoom back out here. We've paged
24 through this phone bill. Does this phone bill list all of the
25 phone calls that Ms. Wakefield made and received?

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1 A No, it does not.

2 Q Why not, sir?

3 A The reason for that is they don't subscribe to detailed
4 billing, which is an additional service or an additional
5 feature. We then provide that as part of the phone bill.

6 Q What is detailed billing?

7 A Detailed billing would provide a list of all of the
8 incoming and outgoing calls on that phone line on the bill.

9 Q So if a subscriber subscribes to detail billing, they get
10 all of the incoming and outgoing phone calls on their bill?

11 A Yes, they do.

12 Q If they don't, where can we find that information?

13 A If they don't, then we find that information in our
14 billing system. We do maintain those records even if we don't
15 provide them as part of the bill.

16 Q Plaintiff's Exhibit 2 that we looked at before, are those
17 printouts for a certain period of time for Ms. Wakefield's
18 billing records?

19 A Yes, they are.

20 Q I'm sorry. I said that wrong; I'll say it again. Is it a
21 printout of Molalla Communications records of the phone calls
22 that were made and received by Ms. Wakefield?

23 A Yes.

24 Q So I'm going to put that back up on the screen. At what
25 period of time do these phone records cover?

L. Eves - D

1 A Going by the listing here, the phone records cover from
2 the 1st of March of 2015 through the 30th of May of 2015.

3 Q Does Molalla Communications have records for just that
4 time period or for other time periods as well?

5 A We maintain records for ten years.

6 Q Why did you only provide those three months in this case?

7 A Those were the months that were asked for.

8 Q Who asked for them?

9 A The attorneys for the defendant.

10 Q That's ViSalus?

11 A Yes.

12 Q Now, I'd like to ask you about these records. I am going
13 to turn to the second page here. Are these the actual records
14 of the incoming and outgoing calls to Ms. Wakefield's number?

15 A Yes, they are.

16 Q That's the number ending in 7628?

17 A Yes.

18 Q On the first page there are some column headers. The
19 first one is "Direction." What does that column header mean?

20 A "Direction" would indicate whether it is an incoming or
21 outgoing call, which is in reference to the residence, so
22 Ms. Wakefield's location. So if it is an incoming call, it
23 would be a call that would be going into her phone. An
24 outgoing call would be a call that she made or someone from her
25 house made.

L. Eves - D

1 Q Someone from her house made to someone else?

2 A To someone else, yes.

3 Q The second column is "Date." Tell the jury what the
4 "Date" column shows.

5 A The "Date" is the date of the call.

6 Q The next two columns are "From number" and "To number."
7 What is that?

8 A So that's the number either from or to. If it is an
9 incoming call, it would be the number from outside of our
10 service area to inside to her actual number; and then on
11 outgoing, it would be the opposite.

12 Q So if it is an incoming call, the from number is the
13 number that called Ms. Wakefield's landline?

14 A Yes.

15 Q And if it is an outgoing call, then the from number is
16 Ms. Wakefield's phone number.

17 A Yes, sir.

18 Q The next column is "Call Start Time." What does that
19 mean?

20 A That is the time that the call was initiated or -- in the
21 case of an incoming call, it would be the time that it was
22 answered.

23 Q And now the first row here says, "17:46:39." What does
24 that mean?

25 A That is the actual duration of the call.

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1 Q You may have misheard me again. Let me try that again.
2 The first row under "Call Start Time," it says 17:46:39. What
3 does that mean?

4 A That is the actual 24-hour time of the call. In this case
5 17:46:39 would be 5:46 and 39 seconds p.m.

6 Q The last column here is "duration." What does that mean?

7 A That's the duration of the call.

8 Q The first row, the duration, that's how long the call
9 took?

10 A Yes.

11 Q If the duration is zero, what does that mean?

12 A That would mean the call rang to the phone, but the phone
13 was not answered or the phone was not picked up on that end.

14 Q And if there is a duration other than zero, what does that
15 mean?

16 A That means someone or something picked up.

17 Q So do you know what the time zone is for these call
18 records?

19 A It would be Pacific Daylight Time.

20 Q Sir, in preparing to testify today, did you listen to some
21 voice recordings?

22 A Yes.

23 Q Did those voice recordings include a call-back number
24 that's listed on these phone bills?

25 MR. O'NEAL: Objection, Your Honor. Foundation.

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1 Hearsay.

2 THE COURT: One moment. I'm going to sustain and let
3 you rephrase. Take it one step at a time to build a
4 foundation.

5 BY MR. FRANZINI:

6 Q Sir, in preparing to testify today, did you listen to some
7 voice recordings?

8 A Yes, I did.

9 Q In those voice recordings did you hear call-back phone
10 numbers?

11 MR. O'NEAL: Objection. Hearsay.

12 THE COURT: Overruled.

13 THE WITNESS: Yes, I did.

14 BY MR. FRANZINI:

15 Q Were those phone numbers found on Ms. Wakefield's records?

16 A Yes.

17 MR. FRANZINI: Your Honor, I would like to move into
18 evidence Exhibits 43-7 and 43-11.

19 THE COURT: Are these two of the recordings that
20 Mr. Eves listened to?

21 MR. FRANZINI: Yes.

22 THE COURT: Any objection to 43-7?

23 MR. O'NEAL: Yes, Your Honor. Hearsay, foundation,
24 and relevance.

25 THE COURT: 43-11? Same objection?

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1 MR. O'NEAL: Same objection, yes.

2 THE COURT: Based upon Mr. Franzini's representation,
3 I will overrule the objection, subject to reconsideration, but
4 receive 43-7 and 43-11.

5 MR. FRANZINI: Thank you, Your Honor. May I get the
6 whiteboard and write some numbers down while they are playing?

7 THE COURT: You may.

8 Mr. Franzini, to make sure I understand this
9 correctly, these two exhibits are recorded messages that
10 contain a call-back telephone number that Mr. Eves says he has
11 seen on Exhibit 2; am I correct?

12 MR. FRANZINI: That's right, Your Honor.

13 THE COURT: Okay. You may proceed.

14 BY MR. FRANZINI:

15 Q Mr. Eves, I would like to play you two recordings, and I
16 am going to write down the call-back number and then ask you
17 about it. Will that be all right?

18 A Yes.

19 (Exhibit 43-11 was played in open court.)

20 THE COURT: The last one was 43-11? What did we just
21 listen to?

22 MR. FRANZINI: Your Honor, I am sorry. I will do it
23 again.

24 THE COURT: Tell us what we are listening to
25 beforehand.

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1 MR. FRANZINI: Yes, Your Honor. I apologize. I am
2 going to do 43-7 first, Your Honor.

3 THE COURT: Okay.

4 (Exhibit 43-7 was played in open court.)

5 MR. FRANZINI: Your Honor, I would like to play
6 43-11.

7 THE COURT: All right.

8 (Exhibit 43-11 was played in open court.)

9 BY MR. FRANZINI:

10 Q Mr. Eves, I am going to pull the Molalla Communications
11 records back up and ask you whether any of these two numbers
12 appear on the records.

13 First, let's look at April 2nd. Sir, do the Molalla
14 Communications records show any phone calls from either the
15 number ending in 7521 or the number ending in 7514 made to
16 Ms. Wakefield on April 2nd?

17 A Yes.

18 Q Let's look at the first one.

19 THE COURT: Can you expand this so we can see which
20 column those numbers are appearing.

21 MR. FRANZINI: The short answer is the columns don't
22 appear --

23 THE COURT: Let's go back then to the page where the
24 columns appear so we can all refresh our memory what the third
25 column and the fourth column means.

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1 The third column is "From"; fourth column is "To",
2 right?

3 MR. FRANZINI: That's right, Your Honor.

4 THE COURT: You may proceed.

5 MR. FRANZINI: Thank you, Your Honor.

6 BY MR. FRANZINI:

7 Q I'm going to go back to April 2nd. Sir, I would like to
8 ask you about three phone calls shown on the Molalla
9 Communications records for April 2nd. Did Ms. Wakefield
10 receive a number -- a phone call from (248) 764-7521 on
11 April 2nd?

12 A Yes.

13 Q Was it an incoming call or an outgoing call?

14 A Incoming.

15 Q When was that call received?

16 A The first call was received at 1:19 and 50 seconds p.m.

17 Q How long did that call last?

18 A 34 seconds.

19 Q Can you tell, based on these records, whether that call
20 was picked up?

21 A It was picked up, yes.

22 Q How do you know that, sir?

23 A There is a duration, which would indicate that the call
24 was picked up.

25 Q Is there another call from the number (248) 764-7521 on

L. Eves - D

1 April 2nd?

2 A Yes, there is.

3 Q Is that an incoming call or an outgoing call?

4 A An incoming call.

5 Q And what time was that call received?

6 A At 1:38 and 37 seconds p.m.

7 Q Was that call picked up?

8 A Yes, it was.

9 Q And how long did the call last?

10 A 24.6 seconds.

11 Q So that was about 20 minutes after the first call, sir?

12 A Yes, it appears so.

13 Q Was there a third call from one of these two (248) numbers
14 received at the Wakefield residence on April 2nd?

15 A Yes.

16 Q What number was it received from?

17 A (248) 764-7514.

18 Q And that was one of the numbers that you heard on the
19 recordings?

20 A Yes.

21 Q What time was that call received?

22 A That call was received at 1:59 and 23 seconds p.m.

23 Q So again, that's about 20 minutes after the prior call?

24 A Yes.

25 Q Was that call picked up?

L. Eves - D

1 A Yes, it was.

2 Q And how long did it last?

3 A 38.2 seconds.

4 Q So I would like to move on to April 8th. According to the
5 Molalla Communications phone records, was another call received
6 at the Wakefield residence on April 8th from a (248) area code?

7 A Yes, it was.

8 Q What number was the call received from?

9 A (248) 764-7514.

10 Q Again, sir, was that one of the call-back numbers that you
11 heard on the recorded voice we just listened to?

12 A Yes, it was.

13 Q What time was that call received?

14 A That call was received at 2:12 and 37 seconds p.m.

15 Q And was it picked up?

16 A It was.

17 Q How long did that call last, sir?

18 A Nine seconds.

19 Q I would like to ask you about one more call, Mr. Eves.

20 This one is on --

21 THE COURT: One second. Can we go back to those last
22 two?

23 MR. FRANZINI: Yes.

24 THE COURT: Would you highlight those two calls for
25 me.

L. Eves - D

1 MR. FRANZINI: The April 8th one, Your Honor?

2 THE COURT: Yes, please.

3 Mr. Eves, does this indicate that these two calls
4 were received at exactly the same time? 2:12 p.m. and 37
5 seconds? Am I misreading that?

6 THE WITNESS: I believe there is one call at
7 2:12 p.m., Your Honor.

8 THE COURT: So why do we have -- oh, I see. It is
9 just the way you are calling it up. I see.

10 Mr. Franzini, you are just highlighting for us in the
11 center of the page what has been highlighted in the bottom. So
12 we don't have two calls; we have one call?

13 MR. FRANZINI: That's right, Your Honor. It is
14 called a crop-zoom. It crops it up.

15 THE COURT: Got it.

16 MR. FRANZINI: Thank you, Your Honor.

17 BY MR. FRANZINI:

18 Q Mr. Eves, I would like to ask you about one more call.
19 This one was on April 28th.

20 Sir, did Ms. Wakefield receive, according to these
21 records, another call from a (248) number on April 28th, 2015?

22 A Yes.

23 Q What number did she receive that call from?

24 A (248) 764-7521.

25 Q What time was that call received?

L. Eves - D

1 A 9:15 and 48 seconds a.m.

2 Q Was the call picked up?

3 A Yes, it was.

4 Q How long did the call last?

5 A 39.8 seconds.

6 Q Can you tell, based on these records, whether the call was
7 picked up from a live person or an answering machine?

8 A I cannot.

9 Q And that's the same for all the calls that we just talked
10 about?

11 A Yes.

12 Q Mr. Eves, based on these records -- let me take a step
13 back. We listened to two recordings earlier, and I wrote down
14 the call-back numbers. The call back numbers were
15 (248)764-7521 and (248)764-7514. Based on the Molalla
16 Communications records, how many calls from these two numbers
17 did Ms. Wakefield receive in April of 2015?

18 A Five.

19 Q And are these records reliable records of the calls that
20 Ms. Wakefield received?

21 A Yes, they are.

22 Q Why is that, sir?

23 A These are records that are transmitted electronically
24 automatically from our telephone switch when the call comes in
25 and recorded to our billing system through billing files. So

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1 they're programmatically created and not touched by human
2 intervention at all.

3 MR. FRANZINI: Thank you, Mr. Eves. I appreciate
4 your time. I have no further questions.

5 THE COURT: Cross-examination.

6 MR. O'NEAL: Your Honor, before I start, could I ask
7 Mr. Franzini to play the two audio clips one more time.

8 THE COURT: Yes. So tell us which one you are
9 playing first, 43-7 or 43-11.

10 MR. FRANZINI: Your Honor, I am going to play 43-7
11 first.

12 THE COURT: All right.

13 (Exhibit 43-7 was played in open court.)

14 THE COURT: Can I hear that one more time?

15 MR. FRANZINI: The same one, Your Honor?

16 THE COURT: Same one.

17 (Exhibit 43-7 was played in open court.)

18 THE COURT: All right. Next, 43-11.

19 MR. FRANZINI: This is 43-11.

20 (Exhibit 43-11 was played in open court.)

21 THE COURT: And play that one more time.

22 (Exhibit 43-11 was played in open court.)

23 THE COURT: Thank you, Mr. Franzini.

24 And now, cross-examination.

25

L. Eves - X

1 CROSS-EXAMINATION

2 BY MR. O'NEAL:

3 Q Good morning, Mr. Eves.

4 A Good morning.

5 Q A couple of quick questions about those calls and
6 messages. If I understand your testimony correctly, looking at
7 Exhibit 2, the first call that came in from number
8 (248)764-7521 at 2:19 p.m., that lasted 34 seconds; is that
9 right?

10 A On which date?

11 Q That's April 2nd, 2015.

12 A Yes. That is correct.

13 Q And the second call on that day lasted 24.6 seconds,
14 right?

15 A Correct.

16 Q And the third call was 38.2 seconds, right?

17 A Correct.

18 Q Before you came to testify today, did you meet with
19 counsel to go over those messages?

20 A Yes.

21 Q Did you guys press a stopwatch timer to see how long the
22 messages played?

23 A No.

24 Q Did you do any comparison to see how long the messages
25 lasted versus how long the calls lasted on these records that

L. Eves - X

1 you said were reliable?

2 A No.

3 Q By my quick calculation the first message was only 19.78
4 seconds.

5 THE COURT: Is that 43-7?

6 MR. O'NEAL: Yes, Judge.

7 THE COURT: How many seconds?

8 MR. O'NEAL: 19.78 seconds.

9 THE COURT: Okay.

10 BY MR. O'NEAL:

11 Q Why didn't you do that?

12 A That wasn't part of what I was requested to do.

13 Q Counsel didn't ask you?

14 A Yes.

15 Q By my calculation the second call was 19.15 seconds,
16 again, less than the length of that phone call that we just
17 looked at, right?

18 A Correct.

19 Q Counsel didn't ask you to stopwatch the message and see if
20 you could match it up to the length of the call, did he?

21 A No.

22 Q Since those calls were 19 seconds, they had to have been
23 longer than the nine second call that are shown on these
24 records at -- oh, I think it was April 8th at 2:12 p.m., right?

25 A It was nine seconds for the call, yes.

L. Eves - X

1 Q So those messages were longer than that call?

2 A I don't know. I didn't dial them.

3 Q Then if we go to the call on April 28th, that's the call
4 that came in at 9:15?

5 A Yes.

6 Q How long was that call?

7 A 39.8 seconds.

8 Q Almost 40 seconds?

9 A Yes.

10 Q More than double the length of those two calls -- or those
11 two messages; is that right?

12 A If that's what you say they were, yes.

13 Q While you have been working -- I should back up and ask:
14 What do you do at Molalla? What's your job?

15 A My job is to oversee all technical operations within the
16 company.

17 Q Does that include looking at phone numbers -- where they
18 come from; who they might belong to?

19 A If need arises, yes.

20 Q And in that role, I am assuming you have come to learn who
21 uses 1-800 numbers or toll-free numbers; is that right?

22 A Could you clarify?

23 Q Sure. Let me back up. Toll-free numbers -- 1-800,
24 1-877 -- those are numbers that people call and they don't get
25 charged for, correct?

L. Eves - X

1 A Correct.

2 Q And they are often used by businesses to make calls to
3 people too, correct?

4 A Usually they are used for people to make calls back to the
5 business, yes.

6 Q But they are also used by businesses to call people,
7 right, at least based on your experience?

8 A So I think you're talking technicalities.

9 Q Please tell me what it is.

10 A Toll-free numbers are not outbound call-in numbers. So
11 for a company to call outbound, they have a number that is
12 separate from an 800 number. The 800 number would be the
13 number that points to their actual number.

14 Q So let me see if I can back it up. I might have like an
15 Oregon area code number. I make a dial out from that number,
16 but it would then show up on Molalla's phone records as a
17 toll-free number?

18 A Not usually. It would show up as what the originating
19 number actually was.

20 Q So let's go to plaintiff's phone records.

21 MR. FOSTER: Your Honor, may I move the lecturn?

22 BY MR. O'NEAL:

23 Q This is Exhibit 2, right, that you have in front of you?

24 A Yes.

25 Q And let's go to that call.

L. Eves - X

1 A Okay.

2 Q (877)561-2272. Do you see that?

3 A Yes.

4 Q Is that in the inbound or outbound column?

5 A An inbound column.

6 Q So help me understand why we are having an inbound call
7 showing on Molalla's phone records showing as an 877 number?

8 A In that case that is the actual number of the call.

9 Q So in that instance that is a number where someone is
10 calling Ms. Wakefield or Mr. Wakefield because this is a joint
11 telephone number, correct?

12 A Correct.

13 Q And they are calling from an 877 toll-free number, right?

14 A Correct.

15 THE COURT: Mr. O'Neal, do you know how to clear the
16 screen?

17 MR. O'NEAL: I don't, Judge.

18 THE COURT: See the arrow in the upper right-hand
19 corner. Now press "clear." Then the box will go back in a
20 minute.

21 BY MR. O'NEAL:

22 Q That indicates that someone at the Wakefield house
23 received a toll-free number call that lasted -- oh, it looks
24 like 35.7 seconds. Did I get that right?

25 A For which are you --

L. Eves - X

1 Q The April 4th, 2015, call?

2 A Yes, 35.7 seconds.

3 Q And we also have another call on April 21st from that same
4 number, right?

5 A Yes.

6 Q And that call lasted 33.9 seconds, correct?

7 A Yes.

8 Q And there is also another call from an (877) number that
9 lasted seven seconds, correct?

10 A Correct.

11 Q Roughly about the same amount of time as the numbers or
12 the times of the calls that came from ViSalus on April 2nd and
13 April 8th; is that right?

14 A Yes.

15 Q In your experience in working at the phone company, who
16 typically uses (800) numbers for outbound calls?

17 A In my experience telemarketers use --

18 Q Telemarketers do. Also debt collectors, right?

19 A I don't know. But yes, it could be possible. Anyone
20 could use it.

21 Q But certainly telemarketers, in your experience?

22 A Yes.

23 Q Following up on a couple of questions that counsel asked,
24 people do use numbers which are registered as residential lines
25 for home businesses, correct?

L. Eves - X

1 A I would assume, yes.

2 Q So the designation on a phone record of residential
3 doesn't dispositively mean that it is or isn't being used for
4 business purposes, correct?

5 A It means they signed up as an individual instead of a
6 business.

7 Q So, for example, a sole proprietor individual could have
8 used that number running a business out of their house if they
9 wanted to?

10 A Yes.

11 Q Also, does Molalla charge a fee for voice mail on its
12 residential landline service?

13 A Yes, we do.

14 Q And are there any charges for voice mail shown in the
15 Wakefields' bill?

16 A No.

17 MR. O'NEAL: No further questions, Your Honor.

18 THE COURT: All right. Redirect by Mr. Franzini.

19 Mr. Franzini, let me ask you too, does plaintiff
20 agree that the 43-7 recording that we heard is approximately 20
21 seconds? Mr. O'Neal said 19.78, but I will round it to just a
22 fraction under 20 seconds.

23 Does plaintiff agree?

24 MR. FRANZINI: I think it is slightly more,
25 Your Honor, but essentially, yes, about 20 seconds.

L. Eves - ReD

1 THE COURT: And about 19 seconds or 19.15 seconds for
2 43-11? Does the plaintiff agree?

3 MR. FRANZINI: Again, I think it is a little bit more
4 than that, but about the same, yes.

5 THE COURT: You may proceed with redirect.

6 REDIRECT EXAMINATION

7 BY MR. FRANZINI:

8 Q Mr. Eves, when we met, we talked about the duration of
9 phone calls in comparison to how long a prerecorded message
10 plays, right?

11 A Yes.

12 Q Is it possible for a phone call to show up on a Molalla
13 Communications -- let me give you a better question.
14 Withdrawn.

15 Sir, is it possible that a phone call, when using a
16 20-second prerecorded message, would end up with a phone
17 duration on your phone bill of 24 seconds?

18 A Yes.

19 Q Can you explain to the jury how that might come about?

20 A There are a lot of intricacies in the telephone network
21 overall. So if I have a call that comes in, in particular a
22 telemarketing call, they don't always sense when the call has
23 ended. So if by chance a call comes in and it reaches an
24 answering machine, for instance, at the end of the call, after
25 the message has stopped going, there is some hiss that is built

L. Eves - ReD

1 into the line itself. If that hiss isn't detected properly, it
2 may extend the call longer than what the actual verbal message
3 may be. It could also be that the person who answered the
4 phone didn't hang up immediately. So it may not mean that the
5 message -- say the message is 20 seconds. If I'm holding the
6 phone for an extra ten seconds, it could extend the call out
7 for ten seconds.

8 Q Is it possible for two calls that had the same exact
9 prerecorded message playing to have a different duration?

10 A I would expect them to on a normal telephone call, yes.

11 Q You say you would expect them to. You would not expect
12 the duration to be the same?

13 A No. There are too many variations in audio that allow for
14 an exact duration between two calls.

15 Q Could there be a difference of ten seconds?

16 A It is possible, yes.

17 Q Mr. O'Neal asked you about 1-800 numbers and
18 telemarketers. In your experience, as the chief operating
19 officer of Molalla Communications, do telemarketers make calls
20 from numbers that are not 1-800 numbers?

21 A Yes.

22 Q Do you know which is more common?

23 A I do not.

24 Q Mr. O'Neal asked you about a voice mail service at
25 Molalla. Is it possible for someone to have an answering

L. Eves - ReD

1 machine even though they don't sign up for voice mail?

2 A Yes. Absolutely.

3 Q Can you explain that a bit to the jury?

4 A So an answering machine would be a device located at the
5 person's house that picks up the phone; whereas voice mail is a
6 server essentially at our office that then, when the call
7 reaches the set number of five rings, say five rings, after it
8 rings five times, then it transfers over to our system to the
9 voice mail. So if that were the case, in a call record like
10 this, you would see an extra number where it forwarded to a
11 different number to reach the voice mail.

12 Q So Ms. Wakefield does not have voice mail through Molalla?

13 A No, she does not.

14 Q Is it possible for her to have an answering machine in her
15 house?

16 A Absolutely, yes.

17 Q You can't tell from these records?

18 A No.

19 Q I want to go back to one of the calls Mr. O'Neal asked you
20 about. It was a nine-second call?

21 A Okay.

22 Q If Ms. Wakefield received a call with a prerecorded
23 message that was 20 seconds long, and she hung up after nine
24 seconds, how long would the call duration be on Molalla's
25 records?

L. Eves - ReX

1 MR. O'NEAL: Objection. Speculation.

2 THE COURT: Overruled.

3 THE WITNESS: It would be nine seconds.

4 MR. FRANZINI: No further questions, Your Honor.

5 THE COURT: Recross.

6 RECROSS-EXAMINATION

7 BY MR. O'NEAL:

8 Q The answering machine that you just mentioned that might
9 be a reason it goes longer, is that because the answering
10 machine is recording the message and continues on until the
11 answering machine stops?

12 A The answering machine has some audio -- there is
13 technology built in the answering machine to detect audio. So
14 if it detects what it thinks is audio, it is going to continue
15 recording until it doesn't detect that or until the calling in
16 disconnects.

17 Q Everybody knows answering machines. They are designed to
18 make a recording of a message for posterity so people can
19 listen to it; is that right?

20 A That's the idea behind an answering machine, yes.

21 MR. O'NEAL: No further questions.

22 THE COURT: All right. Can this witness be excused?
23 Any objection?

24 MR. FRANZINI: No, Your Honor.

25 THE COURT: Any objection from defendant?

1 MR. O'NEAL: No objection.

2 THE COURT: All right. Mr. Eves, thank you very much
3 for coming here. You may be excused. You can give that book
4 back to plaintiff's counsel, or Mary. Thank you, Mr. Eves.

5 I think now would be a good time for our mid-morning
6 recess. We will take 15 minutes. Is that all right with you,
7 members of the jury?

8 15 minutes.

9 (Open court; jury not present:)

10 THE COURT: We are here without the jury. Let me ask
11 plaintiff's counsel what's going to happen next.

12 MR. JACOBSON: Next, Your Honor, is Ms. Wakefield,
13 and there is a short issue for the Court to address.

14 THE COURT: Okay. Let's talk about it.

15 MR. JACOBSON: Your Honor recalls that we had a
16 motion in limine to exclude any mention of damages, \$500 per
17 call. Your Honor granted that motion. Mr. O'Neal suggested
18 that he wanted to be able to cross Ms. Wakefield on that,
19 Your Honor. I don't think Your Honor ruled finally on that.
20 Your Honor said that you would like to ask Ms. Wakefield what
21 her expectations are before making a decision on whether that
22 should be prevented under Rule 403.

23 THE COURT: So let me ask, Mr. O'Neal, what's the
24 question you would like to put to Ms. Wakefield?

25 MR. O'NEAL: The questions would be: Do you have any

1 expectation of payment of any source as a result of this?

2 MR. JACOBSON: Your Honor, let's not have her get
3 into confidential settlement discussions.

4 THE COURT: Sure.

5 Let me ask you, Ms. Wakefield, if you are asked on
6 the stand in front of the jury whether or not you have any
7 expectation, if you were to win the trial, how much you will be
8 receiving as a result of winning the trial, what would your
9 answer be?

10 THE PLAINTIFF: I have none at this point. I'm
11 leaving it to my attorneys.

12 THE COURT: Do you have any expectation that if you
13 win the trial, you will receive some money?

14 THE PLAINTIFF: At this point I'm leaving it in my
15 attorneys' hands.

16 THE COURT: All right. Mr. O'Neal, can you live with
17 that answer?

18 MR. O'NEAL: If I could have one more follow-up
19 question.

20 THE COURT: Yes. Of course.

21 MR. O'NEAL: Whether or not anyone from the
22 plaintiff's side has paid for any expenses of Ms. Wakefield or
23 her family members.

24 THE COURT: If you were asked that question, what
25 would your answer be?

1 MR. O'NEAL: Whether or not anyone from the
2 plaintiff's side, the law firms, have paid or advanced you for
3 any expenses you have incurred or has paid or advanced any
4 expenses your family has occurred.

5 THE PLAINTIFF: They have paid for everything so far;
6 the attorneys have.

7 THE COURT: Have they provided, though, any money to
8 you or your family --

9 THE PLAINTIFF: No.

10 THE COURT: -- for transportation, living expenses,
11 advancement of other things, not counting litigation expenses?

12 THE PLAINTIFF: No.

13 THE COURT: But in terms of all of the litigation
14 expenses, the attorneys have advanced everything?

15 THE PLAINTIFF: Yes, they have.

16 THE COURT: All right. Mr. O'Neal, are you
17 satisfied? I will let you ask those questions, and we will get
18 those answers.

19 MR. JACOBSON: Your Honor, relevance? Under 403, I
20 don't think he should ask if we have advanced litigation
21 expenses. It is substantially more prejudicial.

22 THE COURT: Mr. O'Neal, response.

23 MR. O'NEAL: I think it definitely goes to bias and
24 motive, Judge. They can argue the weight if they want.

25 MR. JACOBSON: Your Honor, whether we have advanced

1 litigation expenses or not has no influence on the outcome.

2 THE COURT: Really? Let me ask you this: In a class
3 action, who is responsible for the expenses incurred in
4 litigation by the plaintiff?

5 MR. JACOBSON: Typically if it is a contingency
6 arrangement, then the plaintiffs' lawyers cover litigation
7 expenses.

8 THE COURT: And don't they have to be reimbursed by
9 plaintiff under typical ethical rules?

10 MR. JACOBSON: The --

11 THE COURT: The plaintiff's expenses.

12 MR. JACOBSON: Out of a settlement or a result,
13 Your Honor?

14 THE COURT: No. Assume it's a defense verdict. What
15 happens?

16 MR. JACOBSON: Your Honor, I have to be candid with
17 the Court. I don't know.

18 THE COURT: My understanding is that legally and
19 under most ethics rules they are required to be reimbursed, but
20 most plaintiffs' lawyers don't pursue that. Okay. So what? I
21 think this is fair. It is not 403. You may ask those
22 questions.

23 MR. JACOBSON: I understand.

24 MR. O'NEAL: Thank you, Judge.

25 (Recess.)

L. Wakefield - D

1 (Open court; jury present:)

2 THE CLERK: Please be seated.

3 THE COURT: Welcome back, members of the jury.

4 Plaintiff may call the next witness.

5 MR. JACOBSON: Your Honor, the plaintiff calls
6 Ms. Lori Wakefield.

7 (The witness was duly sworn.)

8 THE CLERK: Thank you. Please be seated. Would you
9 please state your name for the record, spelling your last.

10 THE WITNESS: Lori Wakefield. W-A-K-E-F-I-E-L-D.

11 THE COURT: You may proceed.

12 DIRECT EXAMINATION

13 BY MR. JACOBSON:

14 Q Good morning, Ms. Wakefield.

15 A Good morning.

16 Q Could you please introduce yourself to the jury.

17 A I'm Lori Wakefield.

18 Q Ms. Wakefield, have you ever testified in court before?

19 A No.

20 Q Have you ever been in a courtroom like this before?

21 A No.

22 Q How are you feeling?

23 A A little nervous.

24 Q We will take it slow. Where do you live?

25 A About 20 minutes from Oregon City.

L. Wakefield - D

1 Q What's the town you live in?

2 A Molalla, Oregon.

3 Q How long have you lived in Oregon?

4 A For most of my life.

5 Q Are you married?

6 A Yes.

7 Q How long have you been married?

8 A Almost 33 years.

9 Q What's your husband's name?

10 A Byron Wakefield.

11 Q Do you have any children?

12 A Two.

13 Q How old are your kids?

14 A 31 and 30.

15 Q Any grandkids yet?

16 A I have a three-and-a-half-year-old grandson.

17 Q Ms. Wakefield, I would like to ask you about ViSalus.

18 When did you first learn about ViSalus?

19 A Through my mom.

20 Q What was your mom's relationship with ViSalus?

21 A She was a promoter. She called me one day and asked if I
22 would help be underneath her to become a promoter too to help
23 her earn more money and help her.

24 Q You said "promoter." Can you tell us what that means.

25 A To sell the products.

L. Wakefield - D

1 Q Whose products?

2 A ViSalus's products.

3 Q When you become a promoter, do you have to pay ViSalus
4 money to get the products?

5 A Yes, you do.

6 Q And you mentioned that your mom asked you to sign up
7 underneath her. Can you tell us what that means?

8 A When you sign up underneath, they get more money. As each
9 person signs up, you get commission. So I did it to help her
10 and to lose some weight too. I thought I would try the
11 products.

12 Q What kind of products does ViSalus sell?

13 A Weight loss products. You get shakes and you get bars and
14 you get vitamins with it.

15 Q Did you sign up with ViSalus?

16 A Yes.

17 Q Did anyone else in your family sign up?

18 A My husband did too.

19 Q Around what time did you sign up with ViSalus?

20 A Spring of 2012.

21 Q And how did you go about signing up?

22 A I went in on ViSalus's website and went through the back
23 office and put my name and address in and my phone number and
24 my mailing address and the bank information, because it was
25 automatic shipment each month.

L. Wakefield - D

1 Q You mentioned the "back office." Is that a physical
2 place, or is that something on ViSalus's website?

3 A Something on ViSalus's website.

4 Q How do you get to the back office website?

5 A You have to go through ViSalus's home page.

6 Q What information did you put in when you signed up with
7 ViSalus?

8 A My name, number, phone number, address, my Social Security
9 number, and my banking information for auto-shipment each
10 month.

11 Q Let's take a look at Plaintiff's Exhibit 26. There is a
12 tab in your book, P26. Were you able to find it?

13 A Yes.

14 Q Can you tell us briefly what P26 is?

15 A It looks similar to what I filled out in the back office.

16 Q Can you remind us what "the back office" is again?

17 A It is where I signed up for ViSalus.

18 MR. JACOBSON: Your Honor, the plaintiff offers P26
19 into evidence.

20 THE COURT: Any objection from defendant?

21 MR. O'NEAL: Lack of foundation. Hearsay.

22 THE COURT: Overruled. Exhibit 26 is received in
23 evidence.

24 You may show the jury.

25 MR. JACOBSON: The plaintiff also offers the other

L. Wakefield - D

1 promoter applications discussed previously: P8, P11, P13, P15,
2 P17, P19, P20, P22, P24, and P27.

3 THE COURT: All right. First of all, we don't need
4 to refer to them as "P," just "exhibits." 8, 11, 13, 15, 17,
5 19, 20, 22, 24, and 27?

6 MR. JACOBSON: Correct.

7 THE COURT: One moment. All right. We have
8 discussed those previously. All objections are preserved.
9 They are overruled, and I will receive those exhibits in
10 evidence under 803(6). They are received.

11 You may proceed.

12 MR. JACOBSON: Thank you, Your Honor.

13 May I show P26 to the jury?

14 THE COURT: 26? Yes, of course.

15 MR. JACOBSON: Thank you.

16 BY MR. JACOBSON:

17 Q Ms. Wakefield, do you see on this promoter application,
18 there's a box "communication preferences"?

19 A Yes.

20 Q How does that compare to what you filled out online?

21 A It looks similar to what I filled out online.

22 Q Let's zoom in on that one.

23 Do you see that it asks for your home phone number
24 and your mobile phone number?

25 A Yes.

L. Wakefield - D

1 Q Did you provide either a home phone number to ViSalus or a
2 mobile phone number?

3 A I gave them my home phone.

4 Q What's the home phone number that you provided?

5 A (503)829-7628.

6 Q Can you say that slowly for us one more time.

7 A (503)829-7628.

8 Q What address was that home number for?

9 A 827 East Fourth Street, Molalla, Oregon.

10 Q And in 2012, who lived at 827 East Fourth Street?

11 A Byron and I, my husband.

12 Q Returning to the promoter application, do you see this box
13 that says "received ViSalus news and updates," and then there
14 is an option for phone?

15 A Yes.

16 Q Did you check the "phone" box when you signed up?

17 A Yes.

18 Q Ms. Wakefield --

19 A Actually I checked -- I would have checked "none," because
20 I only wanted contact through when I was there.

21 Q Sure. Maybe you misheard my question. Let me ask again.
22 Did you check the "phone" box when you signed up?

23 A No.

24 Q Why not?

25 A Because I did not want any contacts from ViSalus; only if

L. Wakefield - D

1 there was an emergency they could call when I was there.

2 Q In this application do you see any questions that ask for
3 your consent to call you with recorded messages?

4 A Yes.

5 Q Ms. Wakefield, maybe you misheard me. Do you see any
6 question that superficially asks for your consent to receive
7 recorded messages?

8 A No.

9 Q And if there was a question like that, would you have
10 agreed?

11 A No.

12 Q Why not?

13 A Because I don't want anybody calling me with recorded
14 messages at my house.

15 Q Do you see this blank space that says "company name," and
16 then it says, "If doing business as a legal entity, complete
17 and attach the company enrollment form"?

18 A Yes.

19 Q Did you fill in a company name when you signed up?

20 A No.

21 Q Why not?

22 A Because I don't have a company.

23 Q Did you provide a business phone number when you signed
24 up?

25 A No.

L. Wakefield - D

1 Q Ms. Wakefield, after you signed up with ViSalus, what did
2 they ship to you?

3 A They shipped me a kit with milkshakes for the weight loss
4 program and some of their catalogs and sample packets to hand
5 out.

6 Q Did you have to pay them to get that stuff?

7 A Yes. There was a starter kit fee. I don't know how much
8 it was at the time.

9 Q Before you signed up with ViSalus, did you have any
10 previous business experience?

11 A No.

12 Q Did you ever try to sell for a multilevel marketing
13 company?

14 A No.

15 Q What did you do to try to sell the ViSalus products?

16 A I talked to some of my friends; just tried to share some
17 of the samples with them.

18 Q How did it go?

19 A Not very good. They liked the taste and stuff of it, but
20 I wasn't losing any weight and neither did they.

21 Q Did anyone buy products from you?

22 A No.

23 Q After you tried to sell the ViSalus products, did you
24 continue on buying from ViSalus, or did you do something to end
25 your relationship?

L. Wakefield - D

1 A I ended it.

2 Q How did you end your relationship with ViSalus?

3 A I went back on the ViSalus website into my back office and
4 canceled it.

5 Q When did you terminate your relationship with ViSalus?

6 A In May of 2012.

7 Q Was it around the spring of 2012?

8 A Yeah.

9 Q How long total did your relationship with ViSalus last?

10 A About two months.

11 Q How about your husband, Byron? Did he continue on with
12 ViSalus, or did he quit too?

13 A He quit too.

14 Q When was that?

15 A About the same time I did.

16 Q Did he cancel for himself, or did somebody do that for
17 him?

18 A I did it.

19 Q And how did you cancel for Byron?

20 A Same. On ViSalus's website, I canceled it.

21 Q After you canceled through ViSalus's website, did ViSalus
22 stop shipping you stuff, or did they keep shipping you stuff?

23 A They kept shipping me stuff.

24 Q What did you do about that?

25 A I kept trying to send it back. It kept charging my credit

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1 card.

2 Q Were you ever able to get written confirmation from
3 ViSalus that your relationship was done, and they wouldn't ship
4 any more stuff?

5 A Yes.

6 Q Approximately when did you finally get that written
7 confirmation?

8 A March of 2013.

9 Q Please take a look at P7 in the book.

10 THE COURT: We don't need to use "P."

11 MR. JACOBSON: I understand, Your Honor.

12 THE COURT: Well, then let's do it.

13 MR. JACOBSON: I will stop. It is a habit.

14 THE COURT: Exhibit 7.

15 BY MR. JACOBSON:

16 Q Exhibit 7 in your book. Can you tell us in a couple of
17 sentences what Exhibit 7 is?

18 A My emails back and forth with ViSalus.

19 MR. JACOBSON: Your Honor, plaintiff offers Exhibit 7
20 into evidence.

21 THE COURT: We talked about that previously too.
22 Everything is preserved.

23 Anything additional I should consider?

24 MR. O'NEAL: No, Judge.

25 THE COURT: All right. Exhibit 7 is received in

L. Wakefield - D

1 evidence.

2 MR. JACOBSON: May I publish a page to the jury?

3 THE COURT: You may.

4 BY MR. JACOBSON:

5 Q Ms. Wakefield, let's look at Exhibit 7, page 8. Do you
6 see this says "membership cancellation/membership deactivation
7 confirmation"?

8 A Yes.

9 Q Then there's a date below that of March 13th, 2013?

10 A Yes.

11 Q Is this when you got your written confirmation that your
12 relationship with ViSalus was over?

13 A Yes.

14 Q Do you see there's an email here from Jessica Pardon,
15 J. Pardon of ViSalusSciences.com?

16 A Yes.

17 Q And it is sent to byronwakefield@molalla.net?

18 A Yes.

19 Q Who uses that email address, byronwakefield@molalla.net?

20 A Byron and I both do.

21 Q You share that account?

22 A Yes.

23 Q Then do you see the subject is "membership deactivation
24 confirmation," and the email says, "This email is to confirm
25 that the request to deactivate your ViSalus account ID has been

L. Wakefield - D

1 completed"?

2 A Yes.

3 Q Did you receive this email from ViSalus?

4 A Yes.

5 Q At this point did you have written confirmation that your
6 relationship with ViSalus was over?

7 A Yeah.

8 Q Ms. Wakefield, please take a look at page 6 in your book.
9 Can you tell us what Exhibit 6 is?

10 A It is an email from ViSalus.

11 Q And what's the subject of this email?

12 A It's canceled -- a cancellation.

13 Q Is this about your account or your husband Byron's
14 account?

15 A Byron's.

16 MR. JACOBSON: Your Honor, plaintiff offers Exhibit 6
17 into evidence.

18 THE COURT: Anything further I should consider from
19 defendant?

20 MR. O'NEAL: Same objection, Judge.

21 THE COURT: Overruled. Exhibit 6 is received in
22 received.

23 BY MR. JACOBSON:

24 Q Did this email cancel out Byron's account as well?

25 A Yes.

L. Wakefield - D

1 Q At this point did you have written confirmation that you
2 and your husband had no further business relationship with
3 ViSalus?

4 A Yes.

5 Q After you terminated your relationship with ViSalus, how
6 did you feel about them calling your home phone?

7 A I did not want them contacting me anymore.

8 Q In 2013, did ViSalus call you on your home phone?

9 A No.

10 Q In 2014, did you hear anything from ViSalus?

11 A No.

12 Q What about in 2015? Did you get any telephone calls from
13 ViSalus on your home phone line?

14 A Yes.

15 Q What month?

16 A April.

17 Q Were you expecting ViSalus to call your home phone?

18 A No.

19 Q Why not?

20 A I hadn't had any contact with them since I had left the
21 company.

22 Q Did ViSalus call you just once in April, or did they call
23 you multiple times?

24 A They called me multiple times.

25 Q How many times did ViSalus call you in April?

L. Wakefield - D

1 A Five.

2 Q How long had it been since you quit ViSalus when they
3 called your home phone five times?

4 A Three years.

5 Q At that time had you ever told ViSalus that you were
6 interested in buying from them again?

7 A No.

8 Q Had you never told ViSalus that was okay to call your home
9 phone?

10 A No.

11 Q Ms. Wakefield, in April of 2015 did you have caller ID?

12 A Yes.

13 Q When ViSalus called you, did the ViSalus name show up?

14 A Yes.

15 Q Did you write down the phone numbers when ViSalus called
16 you?

17 A Yes.

18 Q Now, Ms. Wakefield, you said you received five calls from
19 ViSalus. After you received a few calls, and you saw ViSalus
20 on the caller ID, why did you keep picking up the phone?

21 A I was trying to get them to stop calling.

22 Q Did you consider just blocking the number?

23 A I wasn't sure how to do a block on my home phone.

24 Q Ms. Wakefield, I'm going to show you a fact that is a
25 stipulation. That means that both parties agree it is true. I

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1 will read it and ask some questions.

2 THE COURT: Let me explain to the jury before we get
3 into any stipulations that the parties have agreed to certain
4 facts that we placed in evidence. This will be in a context
5 known as a stipulation. It is going to be read to you now.
6 You must, members of the jury, treat these facts as having been
7 proved.

8 You may proceed.

9 MR. JACOBSON: Thank you.

10 BY MR. JACOBSON:

11 Q Ms. Wakefield, this agreed fact says: "With POM, ViSalus
12 used two campaign strategies: Press 1 calls (where a
13 prerecorded or artificial voice instructed customers to press 1
14 to be connected to a live person now) and Voice Casting calls
15 (where an audio clip played a prerecorded call-back message)."

16 Let me ask you first about Press 1 calls. Did you
17 get any calls from ViSalus where a prerecorded message asked
18 you to press a button to connect to a live agent?

19 A Yes.

20 Q Did you press the button to connect?

21 A Yes.

22 Q After hearing that recorded message and pressing a button,
23 were you able to connect to a live agent?

24 A Yes.

25 Q What did you say to that ViSalus agent?

L. Wakefield - D

1 A I told them that they were calling a Do Not Call number
2 and to quit calling me.

3 Q Did they stop calling?

4 A No.

5 Q Ms. Wakefield, do you see that this agreed fact says that
6 ViSalus also used Voice Casting calls where an audio clip
7 played a prerecorded call-back message?

8 A Yes.

9 Q Did you get calls from ViSalus with a recorded call-back
10 message?

11 A Yes.

12 Q What, if anything, do you remember about what those calls
13 said?

14 A I remember about having 50 percent off of products and
15 trying to get me to come back as a promoter.

16 Q When you got knows calls, were you a promoter with ViSalus
17 anymore?

18 A No.

19 Q Now, Ms. Wakefield -- let me back up.

20 MR. JACOBSON: Your Honor, at this time plaintiff
21 will offer additional audio files that are ViSalus recorded
22 calls into evidence. These were discussed previously. I will
23 read the exhibit number of each call that we intend to offer.
24 We intend to offer 43-8, 43-10, 43-12, 43-13, 43-14, 43-15.
25 43-17, 43-19, 43-23, 43-24, 43-25, 43-28, 43-29, 43-32, 43-33,

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1 43-34, and 43-35.

2 THE COURT: 35 was the last one?

3 MR. JACOBSON: Yes.

4 THE COURT: We discussed those previously. The
5 objections are overruled. And you've represented to me that
6 those all were produced in discovery by ViSalus, correct?

7 MR. JACOBSON: Yes, Your Honor.

8 THE COURT: All right. They will be received in
9 evidence.

10 MR. O'NEAL: If they are admitted, can we have the
11 remaining messages, which were listed as part of this
12 Exhibit 43 and also identified as Exhibit 58, also moved in at
13 the same time under completeness?

14 THE COURT: Any objection?

15 MR. JACOBSON: I don't believe we intend to offer
16 Exhibit 58. Mr. Franzini would know best if we have objections
17 to moving the remainder of the audio files that counsel
18 mentioned.

19 THE COURT: We can discuss that at another time. I
20 will leave it to defendant to offer them after conferring with
21 plaintiff, but I don't think we need to hear those at the same
22 time we hear these under 106.

23 MR. JACOBSON: I described these as ViSalus recorded
24 calls; more accurately these are ViSalus recorded messages.

25

L. Wakefield - D

1 BY MR. JACOBSON:

2 Q Ms. Wakefield, before you came to court today were you
3 able to listen to some examples of ViSalus recorded messages?

4 A Yes.

5 Q I'm going to play you 43-7. It is a file titled "EOM
6 Blast J. Ewing."

7 THE COURT: I thought the first one you read to me
8 was 43-8.

9 MR. JACOBSON: Mr. Franzini already moved in 43-7 and
10 is 43-11 in.

11 THE COURT: Of course.

12 MR. JACOBSON: I will play 43-7.

13 (Exhibit 43-7 was played in open court.)

14 BY MR. JACOBSON:

15 Q Ms. Wakefield, did you hear anything in that message that
16 sounded like the messages that you got from ViSalus?

17 A Similar possibly, about the 50 percent off of the
18 products.

19 Q Do you know if you got that exact message, or is it
20 possible that you got a message that was kind of similar to
21 that?

22 A Similar.

23 Q Is it possible the message you got was longer or shorter
24 but it was similar content?

25 A Yeah.

L. Wakefield - D

1 MR. O'NEAL: Calls for speculation.

2 THE COURT: Overruled.

3 BY MR. JACOBSON:

4 Q Is it possible that the message that you got was longer or
5 shorter but had similar information?

6 A Yes.

7 Q Let me play you 43-11. This file is titled "L. Gray
8 WinBack 6-17."

9 (Exhibit 43-11 was played in open court.)

10 BY MR. JACOBSON:

11 Q How did that recorded message compare to the ones you
12 received?

13 A Same as the other about the 50 percent off, the money
14 offer, but to come back.

15 Q Did you receive that message or maybe just one similar to
16 it?

17 A Similar to it.

18 Q Could the message you have received have been longer or
19 shorter but similar content?

20 A Yes.

21 Q Let me play you one more example, 43-25. This is called
22 "Rachel WinBack P.R. and customers."

23 (Exhibit 43-25 was played in open court.)

24 BY MR. JACOBSON:

25 Q How did the content of that message compare to the

L. Wakefield - D

1 messages that you got?

2 A Some of the same; the promotion of coming back.

3 Q And when you say "coming back," what do you mean?

4 A Being a promoter and the discounted price of the kits.

5 Q What was that discount offered on?

6 A On the 50 percent off or 100 percent -- \$100 off a kit.

7 Q Are the kits a product that you have to buy from ViSalus?

8 A Yes.

9 Q Now, Ms. Wakefield, did you hear the call-back number in
10 that call ended with 8107?

11 A Yes.

12 Q Is it someone for someone to call your phone and leave a
13 recorded message and the call-back number they leave is
14 different from the number that they're calling from?

15 A Yes.

16 Q Is it also possible for someone to call your phone and
17 leave a recorded message, and they happen to leave a call-back
18 number that's the same as the number they called you from?

19 A Yes.

20 Q Now, Ms. Wakefield, did you get any calls from ViSalus --
21 let me back up. Do you have an answering -- let me back up
22 again.

23 In 2015, when you got these calls, did you have an
24 answering machine hooked up to your phone?

25 A Yes.

L. Wakefield - D

1 Q Did any of these calls from ViSalus not get picked up and
2 go to your answering machine?

3 A Yes.

4 Q Did that result in a message being left on your answering
5 machine?

6 A Yes.

7 Q Did you listen to that message on your machine?

8 A Yes.

9 Q Did you save it after you listened to it?

10 A I erased it.

11 Q Why?

12 A Because I have a habit of erasing my messages on my
13 machine and was not thinking about it.

14 Q From what you remember, how did that message on your
15 answering machine compare to the ViSalus recorded messages that
16 we just heard?

17 A From what I remember it was the 50 percent off and just --
18 that was about all I could remember.

19 Q Was there anything in there about trying to get you back
20 as promoter?

21 A Yeah.

22 Q Now, Ms. Wakefield, did you hear Mr. Eves testify, the
23 representative from the Molalla phone company?

24 A Yes.

25 Q Is that your phone company?

L. Wakefield - D

1 A Yes.

2 Q Was that your phone company in 2015?

3 A Yes.

4 Q Did you hear him testify about your detailed phone records
5 that show the incoming and outgoing calls?

6 A Yes.

7 Q Now, at the beginning of that case -- at the beginning of
8 this case did you have those phone records?

9 A No.

10 Q At the beginning of this case did you have any records
11 that told you line by line what numbers called your house in
12 2015?

13 A No.

14 Q And before you saw these Molalla company detailed records,
15 did ViSalus ask you to identify the dates that ViSalus called
16 you?

17 A Yes.

18 Q Is that before or after you got the phone records?

19 A Before.

20 Q And did you have any records to consult or were you just
21 going on memory?

22 A Going on my memory.

23 Q Did you provide dates?

24 A Yes.

25 Q Did you get them all perfectly correct?

L. Wakefield - D

1 A No.

2 Q Did you get some of the dates wrong?

3 A Yes.

4 Q Did you get the right month that ViSalus called you?

5 A Yeah.

6 Q What month was that?

7 A April.

8 Q Did you get the right number of calls that ViSalus made to
9 your home phone?

10 A Yes.

11 Q How many calls?

12 A Five.

13 Q And who actually obtained these detailed phone records?
14 Was it you that got them or was it ViSalus?

15 A ViSalus.

16 Q After ViSalus got them, were you able to get them?

17 A Yes.

18 Q Did you provide an updated response to ViSalus where you
19 identified the correct dates that they called you?

20 A Yes.

21 Q Did you ever hear ViSalus dispute that they called you on
22 those dates?

23 A No.

24 Q Ms. Wakefield, let's take a look at detailed phone records
25 together. This is Exhibit 2. Let's start with the calls that

L. Wakefield - D

1 came in on April 2nd. You've got a paper copy in your book if
2 that's more helpful.

3 Do you see here that these phone records list calls
4 you got on April 2nd?

5 A Yes.

6 Q Did you get calls from ViSalus on April 2nd?

7 A Yes.

8 Q How many?

9 A Three.

10 Q Can you identify for us the phone numbers that ViSalus
11 called your home phone from?

12 A (248) 764-7521.

13 Q And the next number?

14 A (248) 764-7521.

15 Q And the third call?

16 A (248) 764-7514.

17 Q Have I highlighted the ViSalus calls?

18 A Yes.

19 Q In one hour how many times did ViSalus call your home
20 phone?

21 A Three times.

22 Q What times did ViSalus call your home phone?

23 A 1:19 p.m., 1:38 p.m., and 1:59 p.m.

24 Q Before ViSalus called your home phone three times in an
25 hour, had you heard from them in years?

L. Wakefield - D

1 A No.

2 Q Before ViSalus called you three times in an hour, had you
3 ever given them permission to call your home number after you
4 quit?

5 A No.

6 Q Let's take a look at the phone records for April 8th. Do
7 you see any calls from ViSalus on April 8th?

8 A Yes.

9 Q What's the phone number ViSalus called you from?

10 A (248) 764-7514.

11 Q Have I highlighted that number?

12 A Yes.

13 Q What time did this call come in from ViSalus?

14 A 14:12.

15 Q Is that converted to military time?

16 A Yes.

17 Q Is it 2:12?

18 A 2:12, yes.

19 Q How long was that call?

20 A Nine seconds.

21 Q Was this a Press 1 call or was this some other type of
22 call?

23 A It was an automated Press 1 call.

24 Q Did you press 1 to try to connect to someone in this call?

25 A I did.

L. Wakefield - D

1 Q You see this call is only nine seconds long?

2 A Yes.

3 Q What happened when you tried to press 1 to connect?

4 A I tried to press it, and I got hung up on.

5 Q Now, Ms. Wakefield, let's take a look back at the calls on
6 April 2nd. You identified for us this call I've highlighted
7 from (248) 764-7514?

8 A Yes.

9 Q How does that phone number compare to the Press 1 call
10 that you got on April 8th?

11 A I remember getting a message. I started to push a
12 number -- was prompted to push a number. It automated me to
13 push the number, and I hit it. I got a live person, and I told
14 them not to call me.

15 Q Let's break that down. So this time did you push a number
16 after hearing the Press 1 message?

17 A Yes.

18 Q Were you able connect to a live agent?

19 A Yes.

20 Q What did you say?

21 A I told them not to call me.

22 Q And did ViSalus stop calling you?

23 A No.

24 Q Then let's take a look at the fifth call on April 28th.

25 Can you identify for us any calls from ViSalus on April 28th to

L. Wakefield - D

1 your home phone?

2 A Yes. (248) 764-7521.

3 Q Is it the call I've highlighted in your phone records?

4 A Yes.

5 Q Do you remember about what happened with this call?

6 A It was on my answering machine. I remember answering the
7 machine, and the message from ViSalus said that they were
8 offering 50 percent off with the products.

9 Q Was that the message that you deleted?

10 A Yes.

11 Q How ask that message compare to the example of recorded
12 messages that we heard?

13 A That is about the same that we heard on the messages.

14 Q Now, Ms. Wakefield, we talked about some Press 1 calls.
15 Let me ask you, did you get any calls from ViSalus where when
16 you got the call, you thought this may be a live person who
17 called me?

18 A No.

19 Q Let me ask you my question a little better. Did you get
20 any calls that when you first got the call and you picked up
21 the phone, you thought it might be a live person?

22 A Yes.

23 MR. O'NEAL: Objection. Asked and answered.

24 THE COURT: Overruled.

25 THE WITNESS: Yes, I did.

L. Wakefield - D

1 BY MR. JACOBSON:

2 Q And were you sure it was a live person or could it maybe
3 also have been recorded?

4 A It was a recorded message.

5 Q Let me show you some more facts that both sides agree are
6 true.

7 THE COURT: Counsel, I think it would be helpful if
8 you would identify the stipulation by paragraph number.

9 MR. JACOBSON: Yes, Your Honor. I'm about to read
10 stipulation 24, and then I'll read 25 and 26.

11 BY MR. JACOBSON:

12 Q Ms. Wakefield, do you see this -- I'm reading 24 now. "At
13 least two of the telephone calls may have been from a live
14 person"?

15 A Yes.

16 Q Did you agree that at least two of the calls may have been
17 from a live person?

18 A Yes.

19 Q Did you agree that those two calls definitely were a live
20 person and not a prerecorded message?

21 A No.

22 Q Do you see agreed fact 25 says two of the telephone calls
23 by ViSalus to the landline for the Wakefield residence in April
24 of 2015 may have used prerecorded message?

25 A Yes.

L. Wakefield - D

1 Q Is this a fact that ViSalus agreed to?

2 A Yes.

3 Q Then paragraph 26 says, "Ms. Wakefield received at least
4 five calls from ViSalus between March 1st, 2015, and May 30th,
5 2015, but the parties do not agree on whether those calls were
6 from a live person or contained an artificial or prerecorded
7 voice."

8 Some of your calls, do the parties just dispute
9 whether or not it was a live person or used a prerecorded
10 message?

11 A Yes.

12 Q Let's talk about those two calls from ViSalus where, when
13 you got the call, you thought it may have been a live person
14 calling you.

15 Has ViSalus asked you questions about those calls
16 before?

17 A Yes.

18 Q Was that in your deposition?

19 A Yes.

20 Q Is that when you gave testimony earlier in this case?

21 A Yes.

22 Q When ViSalus asked you if you thought those calls may have
23 been a live person, what did you say?

24 A I said that at that time I thought it was a real person.

25 Q You said you thought it was a live person?

L. Wakefield - D

1 A Uh-huh.

2 Q Now, when you said that, when you gave that testimony, had
3 you had the opportunity yet to listen to what ViSalus's
4 recorded Voice Cast messages sound like?

5 A No.

6 Q Did you get the opportunity to learn what those recorded
7 messages sound like before trial today?

8 A Yes.

9 Q Did we just listen to some of those recorded messages?

10 A Yes.

11 Q And when you listened to what those ViSalus recorded
12 messages sound like, did that tell you anything about those
13 calls that you thought may have been a live person?

14 A They sounded real, because when they called, I answered
15 the phone, and I thought it was a real person. Then I would
16 say "hi" to them, and nobody would respond back, and then I
17 would hang up the phone.

18 Q And you've listened to what the recorded messages sound
19 like today?

20 A Yes.

21 Q Did that tell you that those calls that you thought may
22 have been a live person may have been a recording?

23 A Yes.

24 Q Why is that?

25 A Because when I answer the phone, I usually say "hi" to

L. Wakefield - D

1 somebody, you would think they would respond back, and they
2 never did.

3 Q You mentioned that when you got these calls from ViSalus,
4 you said something to the voice on the other end of the line?

5 A Yes.

6 Q Now, when you are having a conversation with a live
7 person -- let's say it is one of your friends -- and you say
8 something, what do they usually do?

9 A They talk back.

10 Q First, what did you say to this ViSalus voice on the other
11 end of the line?

12 A I wanted to tell them to stop calling. I said, "Hello"
13 and tried to talk -- say something more, but they never
14 responded back.

15 Q After you said something to that voice on the other end of
16 the line, did it say anything back to you?

17 A No.

18 Q Is that consistent with a live person, or is that
19 consistent with a recorded message?

20 A A recorded message.

21 Q What happened after you said something to the voice and it
22 didn't say anything back?

23 A I hung up the phone.

24 Q Ms. Wakefield, given all the evidence that you have now,
25 do you think that more likely than not all the calls you got

L. Wakefield - D

1 from ViSalus were recorded messages?

2 A Yes.

3 Q Ms. Wakefield, when you received these calls from ViSalus
4 in 2015, did you have your daycare business?

5 A Yes.

6 Q Was it just you or did you have employees?

7 A I didn't have any employees. It was just me.

8 Q When did you start that business?

9 A Around 2007.

10 Q Over the years at any given time about how many children
11 were you caring for?

12 A Oh, between -- sometimes between two and four.

13 Q How did you know the parents of these kids?

14 A My husband is a firefighter/paramedic at Molalla Fire and
15 I usually -- I watched the kids from the other families from
16 the fire department.

17 Q Now, one issue in this case is whether your home phone was
18 a residential line or whether it was a business line. So let's
19 talk about that. Was your phone registered as a residential
20 line or a business line?

21 A Residential.

22 Q Did you see Mr. Eves, the Molalla phone company
23 representative, talk about your phone bill?

24 A Yes.

25 Q Did it show that your phone was residential or business?

L. Wakefield - D

1 A Residential.

2 Q Ms. Wakefield, let me show you a photo, and I would like
3 you to tell me if you recognize it.

4 A That is our home.

5 THE COURT: What exhibit number is this?

6 MR. JACOBSON: It is not an exhibit. It is just
7 going to be visual testimony.

8 THE COURT: No, no. There is no such thing. Take it
9 off the screen.

10 MR. JACOBSON: Then we would offer it as
11 Exhibit No. 65.

12 THE COURT: All right. You can lay a foundation for
13 it.

14 First of all, is there going to be any objection to
15 65?

16 MR. O'NEAL: No.

17 THE COURT: All right. 65 is received.

18 BY MR. JACOBSON:

19 Q Ms. Wakefield, do you know what the home you lived in in
20 2015 looks like?

21 A Yes.

22 Q What's this house that's shown?

23 A That was the house that we were in back then.

24 MR. JACOBSON: We offer this as Exhibit 65.

25 THE COURT: And it was just received a few minutes

L. Wakefield - D

1 ago.

2 BY MR. JACOBSON:

3 Q Did you live in this house when ViSalus called you in
4 2015?

5 A Yes.

6 Q Now, Ms. Wakefield, another thing the jury can consider is
7 whether you held your home number out to the public as a
8 daycare number. So let's talk about that. Did you ever
9 advertise your home number as your daycare number?

10 A No.

11 Q Did you ever put it on flyers?

12 A No.

13 Q Did you put it on business cards for your daycare?

14 A No.

15 Q Did you put a sign up in your front yard with a phone
16 number that said "Lori's Daycare"?

17 A No.

18 Q Did you advertise that number as your daycare number in
19 any way?

20 A No.

21 Q When someone called you, and you answered the phone, did
22 you answer it and say, "Hello. You've reached Lori's Daycare"?

23 A No.

24 Q What did you say?

25 A "Hello."

L. Wakefield - D

1 Q Did you ever at any point hold out your home number to the
2 general public as a daycare number in any way?

3 A No.

4 Q You mentioned that the parents of the children that you
5 took care of were firefighters. How did they actually get your
6 number?

7 A They would call me on my -- just call me.

8 Q What number did they typically call when they called you?

9 A They would call my house phone or the cell phone.

10 Q Let's talk about how often they called your cell phone.
11 One of the things that the jury can consider is whether your
12 home phone was primarily used for daycare.

13 MR. O'NEAL: Objection. Counsel is testifying.

14 THE COURT: Sustained. You may rephrase the
15 question.

16 BY MR. JACOBSON:

17 Q Ms. Wakefield, will you talk about what you primarily used
18 your home phone for. I'm showing you your phone records. This
19 is Exhibit 2-2. What period of time do these phone records
20 cover?

21 A From March to May.

22 Q Is that about three months?

23 A Yeah.

24 Q Do these records cover around the time that ViSalus called
25 you?

L. Wakefield - D

1 A Yes.

2 Q Have you looked through all the phone numbers in these
3 phone records to identify calls that were daycare related?

4 A Yes.

5 Q Let's start with March 6th. Do you see any calls on there
6 that were daycare related?

7 A Yes.

8 Q What's the phone number on this one?

9 A March 6th, 2015, there is one. It is (503)351-1063.

10 Q Is it the one I've highlighted?

11 A Yes.

12 Q Whose phone number is that?

13 A It is Brian Lister.

14 Q Who is Mr. Lister?

15 A He is one of our police officers. He is also on our board
16 of the fire department.

17 Q Did you take care of his children?

18 A Yes.

19 Q Take a look at March 9th, same page. Do you see any
20 daycare-related calls?

21 A Yes. (503)318-5047.

22 Q Is that the number that I've highlighted?

23 A Yes.

24 Q Whose phone number is that?

25 A Clint Shaffer (phonetic).

L. Wakefield - D

1 Q Who is Clint Shaffer?

2 A He is a former paramedic at the Molalla fire department.

3 Q Did you care for his children?

4 A Yes.

5 Q Ms. Wakefield, have you looked at your phone records for
6 the rest of March to see if there was any daycare-related
7 calls?

8 A Yes, I did.

9 Q Did you get any other daycare-related calls in March?

10 A No.

11 Q What about April? Did you get any other daycare-related
12 calls in April?

13 A No.

14 Q Did you get any other day-care-related calls on your home
15 phone in May?

16 A No.

17 Q In this three-month period about how many total calls did
18 you make or receive on your home phone?

19 A 299.

20 Q Was it about 301?

21 A Yes.

22 Q And of those 301 calls, how many were related to your
23 daycare business?

24 A Two.

25 Q How many were personal calls?

L. Wakefield - D

1 A 299.

2 Q So, Ms. Wakefield, when you used your home phone, were the
3 vast majority of the calls daycare or were the vast majority of
4 the calls personal calls?

5 A Personal.

6 Q Were these three months typical of how often you used your
7 home phone for daycare versus personal calls?

8 A Yeah.

9 Q All right. Ms. Wakefield, if the daycare parents didn't
10 usually call you on your home phone, how did they get in touch
11 with you?

12 A They would usually text me on my cell, or they would call
13 later in the evening on my cell phone because some were nurses,
14 and so they can't get to their regular phones.

15 Q Can you even get texts on your home phone line?

16 A No.

17 Q Ms. Wakefield, was your residential landline primarily for
18 daycare or the vast majority of the time for personal use?

19 A Personal.

20 Q You said your husband, Byron, is a firefighter. Did he
21 have any kind of home business?

22 A No.

23 Q Back in 2012, when you were a ViSalus promoter for two
24 months, did you use your home line to make calls to try to sell
25 ViSalus products?

L. Wakefield - D

1 A I never sold anything, and I didn't try. I only wanted to
2 help my mom.

3 Q Did you use your home line to try to sell it?

4 A No.

5 Q You mentioned you talked to some friends about it. Was
6 that over the phone or in person?

7 A In person.

8 Q Did your husband, Byron, ever use the home line to try to
9 sell for ViSalus?

10 A No.

11 Q In April of 2015, when you were getting these calls from
12 ViSalus, what business relationship did you have with them?

13 A I had none.

14 Q And after you quit ViSalus, did you ever use your phone
15 for ViSalus business?

16 A No.

17 Q Ms. Wakefield, why did you decide to become the named
18 plaintiff in this class action?

19 A I figured if I was having these many phone calls, I didn't
20 want -- I figured there was more people out there that was
21 going through the same thing that I was going through.

22 Q Have you ever been part of a lawsuit before?

23 A No.

24 Q If you hadn't brought this lawsuit, do you know anyone
25 else that would have stepped up and done it?

L. Wakefield - D

1 A No.

2 Q Ms. Wakefield, did you ever give ViSalus consent or
3 permission to call your home phone with prerecorded messages?

4 A No.

5 Q In this case have you ever heard ViSalus even claim that
6 it had your permission to call you with prerecorded messages?

7 A No.

8 Q Before you filed this lawsuit did ViSalus do anything to
9 take accountability or responsibility for calling you with
10 prerecorded messages?

11 A No.

12 Q Did it say, Ms. Wakefield, "It's a mistake. We called you
13 with prerecorded messages. We're sorry"?

14 A No.

15 Q After you filed this lawsuit, has ViSalus done anything at
16 all to take accountability for calling you with prerecorded
17 messages?

18 A No.

19 MR. JACOBSON: No further questions at this time,
20 Your Honor.

21 THE COURT: Cross-examination.

22 MR. O'NEAL: Your Honor, may I have permission to
23 approach the witness?

24 THE COURT: Of course.

25 MR. O'NEAL: Thank you.

L. Wakefield - X

1 CROSS-EXAMINATION

2 BY MR. O'NEAL:

3 Q Ms. Wakefield, I'm handing you a copy of the deposition
4 that you gave in this case. I am also handing you a copy of
5 the complaint that you filed to start this case, and I'm
6 handing you a copy of the amended complaint that you filed in
7 this case.

8 MR. O'NEAL: May I approach again, Your Honor?

9 THE COURT: You may. You may approach whenever you
10 want. I would just prefer you not stay there. But you are
11 welcome to approach to hand her things whenever you want.

12 MR. O'NEAL: I'm handing you a copy of your responses
13 to ViSalus's written questions called interrogatories.

14 BY MR. O'NEAL:

15 Q Let's start, first, you admit that your story has changed
16 today from what you said before, right?

17 A Correct.

18 Q And before you came into the courtroom today did you meet
19 with your lawyers to prepare for your testimony?

20 A Before today?

21 Q Yeah. Before you came in did you prepare for your
22 testimony today?

23 THE COURT REPORTER: Can you repeat that?

24 THE WITNESS: Can you rephrase that? I am sorry.

25

L. Wakefield - X

1 BY MR. O'NEAL:

2 Q Did you meet with your lawyer to prepare for your
3 testimony today?

4 THE COURT REPORTER: I still didn't hear your answer.

5 THE WITNESS: I'm sorry. Yes.

6 BY MR. O'NEAL:

7 Q How many times have you flip-flopped on your story?

8 A How many?

9 Q Well, why don't you go to the complaint, please, that I
10 handed you.

11 A Which one is that?

12 Q It should say in the right-hand corner "Complaint." Would
13 you like me to show you?

14 THE COURT: You're welcome to come up and point out
15 what you are referring to.

16 BY MR. O'NEAL:

17 Q Maybe since I had some difficulty, maybe it is easier for
18 me to hold on to them and give them to you one at a time.

19 That's your complaint in this case. You filed that
20 complaint in October of 2015, correct?

21 A Yes.

22 Q And that was less than six months after you received
23 telephone calls in April of 2015, right?

24 A Right.

25 Q And you said -- I'm sorry. You reviewed that complaint

L. Wakefield - X

1 before it was filed, correct?

2 A Uh-huh. Yes.

3 Q And you said in that complaint that you got a call from
4 ViSalus on April 9th, 2015, correct?

5 A Correct.

6 Q And that was not accurate, right?

7 A Can you repeat that?

8 MR. JACOBSON: Your Honor, can we hear what paragraph
9 we are referring to? I'm having trouble following.

10 BY MR. O'NEAL:

11 Q Turn to paragraph 22 -- excuse me -- 21. Are you with me?

12 A Yes, I'm on 21.

13 Q 21 says, "On April 8th, 2015, for example, she received a
14 telemarketing call promoting ViSalus."

15 Do you see that?

16 A Yes.

17 Q Then it says, "The next day she received another telephone
18 call promoting ViSalus where she instructed the telemarketers
19 to stop calling her and to make sure she was on the internal
20 'Do Not Call' list."

21 Do you see that?

22 A Yes.

23 Q And that wasn't accurate, was it?

24 A Back then, no.

25 Q Then in paragraph 22 of the complaint you said that you

L. Wakefield - X

1 received a telephone call from ViSalus on April 15th, right?

2 A Right.

3 Q And that was not accurate either, correct?

4 A Correct.

5 Q Then you said -- you filed an amended complaint in this
6 case on February 5th, correct?

7 May I approach?

8 THE COURT: Any time you want. You don't need to
9 ask.

10 BY MR. O'NEAL:

11 Q I'm handing you a copy of your first amended complaint.
12 This was filed on February 5th, 2016, correct?

13 A Correct.

14 Q If you'd go to the same paragraph, paragraph 21, you said
15 in that document that again you received a telephone call on
16 April 9th?

17 MR. JACOBSON: Objection, Your Honor. I don't see
18 that in paragraph 21.

19 BY MR. O'NEAL:

20 Q "On April 8th, 2015, for example, she received a
21 telemarketing call promoting ViSalus."

22 Are you following along with me, Ms. Wakefield?

23 THE COURT: You are reading from paragraph 21?

24 MR. O'NEAL: Correct.

25

L. Wakefield - X

1 BY MR. O'NEAL:

2 Q Then it says, "The next day she received another telephone
3 call promoting ViSalus where she instructed the telemarketer to
4 stop calling her and to make sure she was on the internal 'Do
5 Not Call' list."

6 THE COURT: The objection is overruled.

7 THE WITNESS: Back then -- back then, yes.

8 BY MR. O'NEAL:

9 Q And back then, both at the time that you filed the
10 complaint and you had the first amended complaint, that was a
11 lot closer in time to when the calls were made in April than
12 today, right?

13 A I did not have the call records back then.

14 Q Would you agree that your memory was a little bit better
15 back then, closer to the events, than it is today?

16 A I didn't have the right -- the right evidence back then.

17 Q Perhaps maybe you were getting telephone calls mixed up
18 with other people calling you from 1-800 or 877 numbers?

19 A No, I disagree.

20 Q Take a look at your sworn responses to interrogatories.
21 No. 1, tell the jury on what day you said you received
22 telephone calls.

23 A What did you want? I'm sorry.

24 MR. O'NEAL: May I approach again, Your Honor, to
25 show her?

L. Wakefield - X

1 BY MR. O'NEAL:

2 Q The interrogatory asks you to identify all the calls that
3 you received from ViSalus, correct?

4 A Correct.

5 Q And you reviewed this answer, and you swore under oath it
6 was true, correct?

7 A Back then, yes.

8 Q And what did you say under oath were the dates that the
9 calls were made?

10 A Back then, before all of the evidence, I did not have.

11 Q What did you say in your sworn interrogatory?

12 A In my interrogatory, it was sworn, and, yes, I did believe
13 and I did swear that those were right.

14 Q What were the dates that you said you received calls?

15 A 8th, 9th, 15th, and 28th.

16 Q And that was inaccurate, correct?

17 A Right.

18 Q Would you agree that maybe your memory about events that
19 occurred in April isn't very good?

20 A No.

21 Q Let's talk about what you responded to or what you said in
22 response to counsel's questions about voice mails -- the
23 messages. If I understand correctly, when you received a call
24 from ViSalus, you immediately wanted to end the call, correct?

25 A No. I wanted to get ahold of them and tell them to quit

L. Wakefield - X

1 calling me.

2 Q So when you received a call on April 2nd, and somebody
3 from ViSalus started talking to you, you wanted to keep talking
4 to them, or you wanted to get off of the phone?

5 A I wanted to tell them to quit calling.

6 Q Did you do that?

7 A I tried, yeah.

8 Q And --

9 A But --

10 Q -- they kept talking to you?

11 A It wasn't -- I don't know. I don't know.

12 Q Well, didn't you say in your sworn deposition that when
13 you got a call on April 2nd, that you talked to a live person?

14 A No -- in the sworn document -- or in the sworn statement?
15 In the deposition you are referring to?

16 Q Yes.

17 A In the sworn deposition back then, yes, I did say that.

18 Q And the question was -- you didn't misunderstand it,
19 correct?

20 A What are you saying?

21 Q The question was posed -- you said under oath that you did
22 not receive a prerecorded message on that date, correct?

23 A In the statement back then, yes, I did say that.

24 Q And you said the same thing about the second call that you
25 received from ViSalus. You said that that wasn't prerecorded;

L. Wakefield - X

1 that it came from a live person, correct?

2 A No -- in the sworn statement back then, yes, before the
3 evidence. It had changed because of the current evidence that
4 we have now.

5 Q And that deposition was taken a lot closer to April 2015
6 when the events in question occurred, right?

7 A Yes, but I wouldn't -- I would rather somebody not rely on
8 my memory versus the evidence that we have.

9 Q Why would you not want to rely on your memory?

10 A Because my memory is a lot -- I would rather rely on
11 evidence, not memory.

12 Q And the only written evidence that we have is that five
13 calls were made to you in April of 2015, correct?

14 A No. There is more evidence than that.

15 Q But your memory -- when you said in the complaint and in
16 the amended complaint and in the interrogatories and in your
17 depositions were that the first two calls were with live
18 people, right?

19 A We have other evidence that have been shown today.

20 Q Who showed that to you?

21 A My attorneys did.

22 Q So back then you thought it was live talking to a live
23 person, but then when your lawyers show you something, you
24 switch and say, "Wait a minute. No, it is a prerecorded
25 message"?

L. Wakefield - X

1 THE COURT: Mr. O'Neal, you are going to have to
2 speak more slowly.

3 MR. O'NEAL: Yes, Your Honor.

4 THE WITNESS: I disagree.

5 BY MR. O'NEAL:

6 Q How many times have you changed your story?

7 A Well, I disagree. I disagree. I have not changed my
8 story. I have got the facts now that I only had in my
9 deposition -- I did what -- I knew from the sworn statement and
10 my deposition was true at the time, and now I have got the
11 evidence. And I have not lied. And I have told the truth.

12 Q Ms. Wakefield, isn't it just possible that your memory
13 isn't that good, and you can't say one way or the other about
14 whether any of calls that you had were prerecorded or whether
15 they were a live person?

16 A Not true. I disagree.

17 Q The recorded calls -- let me make sure I understand the
18 timeline correctly. The first call that you received, which
19 was on April 2nd, is it your testimony that that was a recorded
20 message or that was a live person?

21 A It was a recording.

22 Q And you agree that you said in your deposition that it was
23 live, and it wasn't recorded, correct?

24 A In the deposition, yes.

25 Q And as I understand correctly, you believe that one of the

L. Wakefield - X

1 messages that counsel played was the prerecorded message that
2 was played to you?

3 A I said it could be.

4 Q So you don't know for certain whether it was or wasn't?

5 A When I had gotten the message, because it prompted me, it
6 was similar to what I heard because it was press a certain
7 number to be connected to a live agent, and I heard the
8 50 percent off and then the messages.

9 Q I'm sorry, Ms. Wakefield. The messages that were played
10 didn't mention Press 1, did they?

11 A No. But the other parts in there had the percentage off,
12 and I said it sounded similar to it.

13 Q So do you know or do you not know whether the messages
14 that we were listening to -- whether or not that was a message
15 that was played for you on April 2nd?

16 A It sounded similar.

17 Q It is yes or no. Do you know or not know?

18 A I'm -- I -- I don't know. I'm not going to answer because
19 I don't know.

20 Q And similarly for the rest of the calls you don't know
21 whether the messages that were played were any messages that
22 you heard on any of the other --

23 A I do know that they were recorded messages.

24 Q So on what day did you get a recorded message?

25 A On all of the days.

L. Wakefield - X

1 Q So you think you got recorded messages on all of the calls
2 that happened on the 2nd, you think you got a recorded message
3 on the 8th, and also on the 28th; is that right?

4 A Yes.

5 Q And I think you testified that one of the messages that
6 you got was on your answering machine?

7 A Yes. It was on the answering machine.

8 Q What date was that message that was left for you?

9 A On the 28th.

10 Q Had you been talking to your lawyer at that time?

11 A Yes.

12 Q You knew that it was important to save evidence that might
13 be relevant to this case?

14 A I did.

15 Q And you deleted the message anyway?

16 A No. I never thought about -- I didn't know how to get it
17 off my answering machine at that point. It was one of the
18 older answering machines. You just erased.

19 Q You didn't save it; you deleted it?

20 A Yes.

21 Q Counsel was asking you questions about how, when you
22 received these messages, you thought it was a live person, but
23 then you came to realize that it was a recording. I wasn't
24 following you. Why is that so?

25 A Can you rephrase that?

L. Wakefield - X

1 Q Sure. And I could have been mistaken. I thought that you
2 had previously testified that when you got some of these calls,
3 you initially thought that it was a live person, but then you
4 realized it was a recording. Maybe I got that wrong.

5 A You got it wrong. I knew that they were a live person --
6 sorry. I knew it was a recording. And I when the recording
7 came on, it just prompted me, walked you through how much --
8 they were excited on the phone on how much you got off and then
9 how to press a number to be connected to a live person. Then I
10 would get cut off when I would get to a certain point.

11 Q So there was a message that was played like the ones we
12 heard and then it also said to press 1 in the same message?

13 A Similar to the ones we heard, yes.

14 Q Okay. The messages that counsel played didn't have
15 "Press 1" in them, did they?

16 A Not that. I mean, just the percentage off the products.

17 Q Okay. So maybe it is more accurate to say that you heard
18 voices talking about 50 percent off?

19 A Yes.

20 Q And those are on the calls that happened on April 2nd?

21 A On all the calls except for the answering machine.

22 Q Let's focus on the calls on April 2nd. Those are the
23 calls that you said were with a live person, and there was no
24 prerecorded message previous to today, right?

25 A Rephrase that.

L. Wakefield - X

1 Q Sure. The calls on April 2nd you previously said those
2 were with live people, not prerecorded messages, right?

3 A In my depo?

4 Q Yes.

5 A Yes.

6 Q And now it is, "Well, no. They were prerecorded messages
7 and people offering 50 percent off."

8 A Because I have more evidence now.

9 THE COURT REPORTER: Repeat the answer.

10 THE COURT: I think she used the words "evidence
11 now." Is that what you said?

12 THE WITNESS: Yes.

13 BY MR. O'NEAL:

14 Q Were other telemarketers calling you in April of 2015?

15 A No, not that I am aware of.

16 Q You were in the courtroom when I pointed out the 1-800 and
17 877 numbers?

18 A I don't know what those are.

19 Q Let me go back to something you said. When you got calls
20 from ViSalus, you were anxious to end them right away, correct,
21 because you didn't want to get calls from ViSalus, right?

22 A Right.

23 Q So, with respect to the call on April 2nd, why did you let
24 it go on for 34 seconds?

25 A Because I was trying to connect to a live agent so I could

L. Wakefield - X

1 tell them to stop calling.

2 Q And why did you let it go on for 24 seconds on the second
3 call on April 2nd?

4 A To connect with somebody to tell them the same thing
5 again.

6 Q So those two messages we are talking about, you didn't
7 hear anything played to you? It was just press a button and
8 connect to someone at ViSalus?

9 A They were the same thing about the products. "We have an
10 important message for you from ViSalus. We want you to push a
11 number to connect to a live agent."

12 Q I want to break that down, though. Was the message that
13 you think that you heard, was it "we have an important message;
14 press a button," which you did, and then you were cut off? Or
15 was it "we are offering you 50 percent off; press a button,"
16 you did, and then it got cut off?

17 A It was, "This is ViSalus. We have an important message.
18 We are offering 50 percent off," and then it was like connect
19 to -- push a button -- "and we will connect you to a live
20 agent."

21 Q Have you heard any recordings that ViSalus produced that
22 has both "50 percent off" and "press 1" in the message?

23 A Only in the -- the ones I got called.

24 Q So the ones -- the audio clips that ViSalus produced, they
25 don't have that, do they?

L. Wakefield - X

1 A I don't know. I haven't heard them all.

2 Q You were responding to counsel's questions, and you said
3 that when you signed up for ViSalus to be a promoter, you went
4 through the website and put down your telephone number; is that
5 right?

6 A Right.

7 Q Why did you do that?

8 A When I signed up to be a promoter, I put my home phone
9 number down so that I could -- during that time if I had an
10 issue with my products or something, that they could contact me
11 at home during the time that I worked there.

12 Q So when you put down your number, you were agreeing that
13 ViSalus could call you because you had entered into a business
14 relationship with ViSalus, right?

15 A Just during that part of the time, yeah.

16 Q Do you have Exhibit 6 up there?

17 THE COURT: It might be in the notebook.

18 BY MR. O'NEAL:

19 Q This is almost like a chat you were having with ViSalus,
20 right?

21 A Yeah.

22 Q It is where you said the relationship terminated, right?

23 A Uh-huh.

24 Q Where in this document did you say, "Don't call me ever
25 again"?

L. Wakefield - X

1 A I didn't. Once you cancel out your business, you would
2 think that they would never call you again.

3 Q But you had -- in your application, when you wanted and
4 applied to be a promoter, and you became a promoter, you told
5 ViSalus to contact you by phone at your home number, right?

6 A I gave them only my number, and that was it. Who would
7 call you after you quit your work three years later?

8 Q Well, does it seem like a reasonable thing that maybe
9 ViSalus wanted to get another business relationship with you
10 going; maybe come back in a couple of years and say, "Hey"?

11 A No.

12 Q All right. In Exhibit 7, where did you say in there,
13 "Don't call me"?

14 A I don't know.

15 Q Is it in there?

16 A No.

17 Q Do you have any documents where you said, "ViSalus, I know
18 I gave you my number. I know I told you it was okay, but don't
19 call me"?

20 A I don't know.

21 Q When you signed up to be a promoter, you knew that was a
22 contractual relationship under which you were agreeing to go
23 out and try to sell ViSalus products, right?

24 A No, because I was doing it more to help my mom.

25 Q But as a promoter, you understood that what you were going

L. Wakefield - ReD

1 to do was you were going to try to sell products to your
2 friends?

3 A Right.

4 Q So it was a business relationship, right?

5 A Yeah. Yes.

6 MR. O'NEAL: You know, I think I'm fine. Thank you,
7 Ms. Wakefield.

8 THE COURT: All right. Redirect.

9 REDIRECT EXAMINATION

10 BY MR. JACOBSON:

11 Q Ms. Wakefield, ViSalus's attorney asked you about whether
12 or not you got telemarketing calls from some other non-ViSalus
13 number. Do you remember that?

14 A Yes.

15 Q Did you have caller ID in April of 2015?

16 A I did.

17 Q When ViSalus called you, what showed up on your caller ID?

18 A ViSalus's number was on the caller ID.

19 Q Were there recorded messages that you got from ViSalus's
20 number, or were they from some unrelated 1-877 number?

21 A They were ViSalus's numbers that came up.

22 Q ViSalus's attorney asked you some questions about the
23 complaint that you filed in this case?

24 A Yes.

25 Q When you filed that complaint, had you been able to obtain

L. Wakefield - ReD

1 an example of prerecorded messages from ViSalus?

2 A Yes.

3 Q Were those messages something that you got after the
4 lawsuit started and you filed your complaint, or did it happen
5 before the lawsuit even started?

6 A Before -- after.

7 Q After?

8 A After.

9 Q In that complaint did you get some of the dates of the
10 calls wrong?

11 A Yes.

12 Q Were the right dates of the calls in your phone records?

13 A Yes.

14 Q Has ViSalus ever disputed your phone records/tell us the
15 right dates of the calls?

16 A No.

17 Q And ViSalus's attorney asked you about some of your
18 interrogatory responses/responses to written questions?

19 A Yes.

20 Q Was it the same issue there; that some of the dates were
21 wrong?

22 A Yes.

23 Q Was that before you got your phone records?

24 A Yes.

25 Q Did you update those interrogatory responses and tell

L. Wakefield - ReD

1 ViSalus the right dates when you got your phone records?

2 A Yes.

3 Q Have they ever disputed those dates?

4 A No.

5 Q Ms. Wakefield, let's take a look at -- let me back up.

6 ViSalus's attorney asked you about your deposition. Do you
7 remember that?

8 A Yes.

9 Q Let's take a look at that. Do you have your copy up
10 there? There is a tab.

11 A Yes, I do.

12 Q Can you turn to page 45. Let me know when you are there.

13 A I'm there.

14 Q Do you see on line 25 and then going over the next page,
15 ViSalus asked you:

16 "QUESTION: You've told me -- you said, 'I'm on the
17 Do Not Call list and don't call here again.' What was the
18 response from the ViSalus person?

19 "ANSWER: They didn't say anything. I don't know if
20 I hung up on them, or they hung up. So that was the end of the
21 conversation."

22 In your deposition did ViSalus ask you about that
23 call that you thought may have been a live person?

24 A Yes.

25 Q Did you tell ViSalus that you spoke to that person?

L. Wakefield - ReD

1 A Yes.

2 Q Did you tell ViSalus that after you spoke to that person,
3 the voice did not say anything back?

4 A Yes.

5 Q And given all you know today, what does that tell you
6 about whether that was a real person or a recorded message?

7 A A recorded message.

8 MR. JACOBSON: I pass the witness back, Your Honor.

9 THE COURT: Anything further, Mr. O'Neal.

10 MR. O'NEAL: No further questions.

11 THE COURT: All right. Ms. Wakefield, thank you very
12 much. You may step down at counsel table.

13 Members of the jury, how about an hour and 15 minutes
14 for lunch? We will start up at 1:30. Remember, don't discuss
15 the case with anyone, including among yourselves. Don't do any
16 research of any kind, including on the Internet or otherwise.
17 We will see you back at 1:30.

18 (Open court; jury not present:)

19 THE COURT: All right. We are here without the jury.
20 Let me ask plaintiff's counsel, what is coming up at 1:30?

21 MR. DOVEL: Your Honor, our next witness will be by
22 deposition, Scott Gidley, approximately 25 minutes on direct.
23 I'm not sure what the cross portion is.

24 MR. O'NEAL: I haven't timed it.

25 THE COURT: That's fine.

1 MR. DOVEL: Probably 30 minutes total roughly.

2 THE COURT: All right. And then after Mr. Gidley's
3 deposition, then what do we expect?

4 MR. DOVEL: Two more shorter depositions, Mr. Call
5 and Mr. Laun. They total approximately 15 minutes.

6 THE COURT: Very good. After that?

7 MR. DOVEL: Mr. Davis, on the order of 20 minutes --
8 15 to 20 minutes.

9 THE COURT: All right. Very good. That's enough for
10 now.

11 All right. Counsel, please do remember to try to
12 speak more slowly. I don't want to have to enter an order
13 prohibiting you from drinking coffee. (Laughter.)

14 MR. O'NEAL: And I had a lot of it, Judge, and that's
15 probably why.

16 THE COURT: It shows.

17 MR. JACOBSON: And an order that prohibits me saying
18 "P" before "exhibit."

19 THE COURT: All right. I will be back here at 1:30.
20 Let Mary know if you need me sooner than that.

21 (Recess.)
22
23
24
25

1 (Afternoon session; open court; jury not present:)

2 THE COURT: Are we ready for the jury?

3 MR. DOVEL: One matter.

4 THE COURT: You may proceed.

5 MR. FRANZINI: Your Honor, we disclosed Blake Mallen
6 as a witness that we want to call in our case-in-chief. He is
7 on their witness list. He is their new representative they
8 decided to bring. We told them last night we would like to
9 call him. We asked him whether he is here. Mr. O'Neal told us
10 that he is not here, and he won't tell us whether or not he is
11 in Portland. So we would ask if the Court could ask Mr. O'Neal
12 to let us know that; and if so, order him in here so we can
13 call him.

14 THE COURT: On what basis should I order him here?

15 MR. FRANZINI: The Court's inherent authority to --

16 THE COURT: He is not under your subpoena, right?

17 MR. FRANZINI: Your Honor quashed the subpoena on the
18 basis --

19 THE COURT: I know. You don't have subpoena
20 authority over him. So he is here. If the defendant wants to
21 call him, they call him. I'm not quite sure I understand what
22 your basis is.

23 MR. FRANZINI: May we have leave to issue a subpoena
24 now and give it to Mr. O'Neal so we can get Mr. Mallen in
25 court?

1 THE COURT: How are you going to get him served with
2 a subpoena?

3 MR. DOVEL: Well, if we could find out if he was in
4 Portland -- they won't commit one way or the other.

5 THE COURT: I know they won't. I know they won't.
6 Have you decided whether or not to call Mr. Mallen?

7 MR. O'NEAL: We are strongly leaning towards calling
8 Mr. Mallen. I would say it is in the 90 percent plus category.

9 THE COURT: I'll tell you this: If you call
10 Mr. Mallen, I will not restrict the plaintiff to cross-examine
11 within the scope of the direct, but if they go beyond the scope
12 of the direct, they will have to do it -- well, you know what,
13 not necessarily. I was going to say with non-leading
14 questions, but he is clearly an adverse witness. I think you
15 are going to have to wait and see if they call him. If they
16 call him, you can have him.

17 MR. FRANZINI: Thank you, Your Honor.

18 THE COURT: By the way, if they call him, and you
19 want to go beyond the scope of direct, I will allow that. I do
20 not anticipate sustaining an objection to a leading question,
21 given that it will be an adverse direct.

22 MR. FRANZINI: Thank you, Your Honor.

23 THE COURT: Let's bring in the jury.

24 MR. DOVEL: Your Honor, over the lunch hour, we
25 decided we are going to flip the order of the depositions. We

1 disclosed that to the defendants.

2 THE COURT: Does each side know which portions of the
3 transcripts everybody is reading? I've made my rulings. Do we
4 have everything squared away?

5 MR. DOVEL: Yes, Your Honor.

6 MR. ADAMS: So we can save time, can I hand up to
7 Your Honor a copy?

8 THE COURT: Excellent. That's fine. Come on up.

9 (Open court; jury present:)

10 THE COURT: Welcome back, members of the jury. Give
11 me one moment, please.

12 Am I correct, Counsel, we are doing deposition
13 testimony next?

14 MR. ADAMS: That's correct.

15 THE COURT: Members of the jury, as I told you
16 previously, there is something called a deposition. A
17 deposition is sworn testimony of a witness taken before trial.
18 At the deposition the witness is placed under oath to tell the
19 truth. The lawyers for each party may ask that witness
20 questions. The questions and answers are then recorded in a
21 written transcript. The deposition of several witnesses has
22 been taken in this case, and I am going to allow both sides to
23 read to you some of the questions and answers. Frankly, the
24 plaintiff is going to read the questions that they want to have
25 read to you. The defendant will read to you the questions and

1 answers that they want to have read to you.

2 It will be the same person reading the answers,
3 right? Who will that be? Okay.

4 Your name, sir?

5 MR. ROBERTSON: Ian Robertson.

6 THE COURT: All right. So Mr. Robertson will be
7 reading the answers. He is not one of those witnesses. He is
8 not any of those witnesses. So please try to assess the
9 testimony in the same way as if the witness had been present to
10 testify. Obviously do not place any significance on the
11 behavior or tone of voice of any person reading the questions
12 or the answers.

13 All right. Plaintiff may call the next witness,
14 which I understand will be by deposition in lieu of or instead
15 of live testimony.

16 MR. ADAMS: Plaintiff calls John Laun. L-A-U-N.

17 THE COURT: Mary, will you swear in Mr. Robertson to
18 read the deposition testimony accurately, please.

19 (The witness was duly sworn.)

20 THE COURT: No, he's reading.

21 It's "Do you solemnly swear to read the deposition
22 testimony accurately as stated in the transcript?"

23 Because he is not telling the truth; he has to read
24 accurately.

25 (The reader was duly sworn.)

J. Laun - Deposition Excerpts

1 THE COURT: We don't do this very often.

2 MR. ROBERTSON: Ian. I-A-N.

3 THE COURT: You may proceed.

4 MR. ADAMS: Thank you, Your Honor.

5 (The deposition excerpts were read into the record as
6 follows:)

7 DIRECT EXAMINATION

8 BY MR. ADAMS:

9 Q Could you please state your full name for the record.

10 MR. ROBERTSON: I'll need a copy of the transcript,
11 please.

12 THE COURT: You didn't memorize it? From the top.

13 BY MR. ADAMS:

14 Q Could you please state your full name for the record.

15 A John Leon Laun, IV.

16 Q And who is your employer?

17 A ViSalus.

18 Q How long have you been employed by ViSalus?

19 A Eleven years.

20 Q What's your current job title?

21 A Vice president, marketing.

22 Q How long have you held that title?

23 A About two years.

24 Q What was your prior title?

25 A Senior director of marketing.

J. Laun - Deposition Excerpts

1 Q How long did you hold that position?

2 A About two years.

3 Q Before you were the senior director of marketing, what was
4 your job?

5 A Director of communications.

6 Q How long did you hold that job?

7 A That would have been the entire time up until that point,
8 so approximately eight years.

9 Q What's the main way that you sell your products?

10 A The main way we sell our products is through multilevel
11 marketing. So that involves promoters who are independent
12 contractors who have enrolled with ViSalus to own their own
13 business who share our products with their network and people
14 buy the products from that individual.

15 We take a small amount of sales direct through our
16 website, but the vast majority is person-to-person network
17 marketing.

18 Q Do you know how long the average term is for a promoter to
19 sell ViSalus products?

20 A I don't know exactly. I think generally five or six
21 months.

22 Q Do you have an understanding as to how ViSalus -- like
23 what the sign-up process is for promoters?

24 A Yes.

25 Q Okay. Can you describe for me what that process is.

J. Laun - Deposition Excerpts

1 A Promoters generally enroll online through an online join
2 system where they provide information so that they can become a
3 distributor, sign and agree to terms and conditions, and in
4 many cases purchase a starter kit to begin their promotership.

5 Q You said that generally people will sign up to become
6 promoters through an online portal. Is there another mechanism
7 that people use to become promoters?

8 A You can also fill out a paper application and fax or email
9 it into our corporate office.

10 Q Okay.

11 A It's the same information, same steps, same terms and
12 conditions. It is just a promoter may print that out and have
13 somebody sign it and fill it out in person and then send that
14 to our corporate office.

15 Q For the record, the document that I've placed in front of
16 the witness, that's Exhibit 15. Have you seen this document
17 before?

18 A I'm familiar with the structure and form of this document
19 as one of our promoter applications. To know letter for letter
20 if this is the exact one I've seen before, I don't know. But
21 it looks similar to a promoter application that would have been
22 our standard promoter application at one point.

23 Q And when you said that people might print out and fax in a
24 promoter application, is this an example of one of the promoter
25 applications that somebody might fax in?

J. Laun - Deposition Excerpts

1 A This looks like one, yes.

2 Q Okay. And the information that would be collected through
3 the online portal would be the same information that would be
4 collected on this form, right?

5 A Yes. That's the goal. The form is to replicate -- there
6 are two different ways of getting to the same destination -- of
7 getting the information that we need to set up somebody as a
8 promoter so they can earn commissions so we have their address
9 to send them products. So we have their user name, things like
10 that.

11 MR. ADAMS: No further questions of this witness.

12 THE COURT: So, Mr. Adams, that completes the direct
13 examination portion of John Laun's deposition. Let me ask
14 defense counsel, do you have any questions to read that reflect
15 answers by Mr. Laun?

16 MR. O'NEAL: We do, Judge.

17 THE COURT: All right. You may proceed. If you have
18 a copy for me too. Thank you.

19 MR. O'NEAL: Ready to go?

20 MR. ROBERTSON: Yes.

21 CROSS-EXAMINATION

22 BY MR. O'NEAL:

23 Q Are customers and prospects, are those synonymous or two
24 different groups?

25 A Completely different. So, as a company, we communicate to

J. Laun - Deposition Excerpts

1 our promoters in one way as far as the updates and news we
2 would share with them, because promoters are being instructed
3 how to go recruit people and enroll people and improve their
4 bills. So you would tell a promoter about a promotion that's
5 going on and how to communicate that to their customers. Those
6 promoters have personal customers who have already enrolled in
7 the business who are on their team who they communicate to in
8 whichever way they choose. We, as a company, will sometimes
9 communicate to our active opted-in customers a different set of
10 communication.

11 So, for example, if it is 50 percent off our shake
12 product one week, we would tell our promoters how to go
13 communicate this offer to their customers, their team, or also
14 to their prospects or anybody they are looking to tell about
15 ViSalus, which they would then do either through their social
16 network or face-to-face or however they choose to do it.

17 Then we would tell our opted-in customers, who
18 receive communications from our company about the sale, but not
19 how to go sell the sale. Then at the prospect level, we have
20 no way to communicate to prospects. Prospects are the contacts
21 of our promoters and customers, the people they know who aren't
22 part of our network yet. So we don't communicate to anybody
23 who is not already part of our network.

24 Q Okay. But other than that, the structure is essentially
25 the 75 corporate employees and then the 20,000 promoters; is

J. Laun - Deposition Excerpts

1 that right?

2 A Correct. Promoters are independent business owners that
3 are not employees of ViSalus in any way.

4 Q Are you familiar with the term "back office"?

5 A Yes.

6 Q What is the back office?

7 A "Back office" is another term for Bi-Net, which is an
8 online resource for promoters or customers to view information
9 about their personal account. At a promoter level it has
10 business management tools so they can see information and
11 reports on their team. At a customer level it is more about
12 tracking orders and placing or modifying orders or something
13 about your account.

14 Q Do you know if ViSalus maintains any records of the
15 information submitted by a promoter after they submit this
16 form?

17 A My understanding -- and this is on the IT side of how the
18 back office system communicates with our records -- but my
19 understanding is that, based on selection here, makes a note on
20 that person's account, which tells us the method by which they
21 want to be communicated to, which helps us filter our
22 communications.

23 Q Okay. Now, did the marketing team ever provide the
24 support team with prerecorded messages that they would play for
25 outbound calls?

J. Laun - Deposition Excerpts

1 A I don't know. I don't know how they would have used
2 prerecorded messages. We have provided prerecorded messages
3 with a whole blind for people calling in. I don't know if any
4 of those were ever used for an outbound call or not.

5 MR. O'NEAL: That's all, Judge.

6 THE COURT: All right. Thank you very much. That
7 concludes the deposition excerpts for the witness John Laun.
8 L-A-U-N.

9 All right. The plaintiff may call the next witness.

10 MR. ADAMS: Thank you, Your Honor. The plaintiff
11 calls Justin Call.

12 THE COURT: All right. Members of the jury, again,
13 Mr. Call's deposition, Justin Call -- C-A-L-L -- has previously
14 been taken. I take it, Mr. Robertson, you will be reading
15 Mr. Call?

16 THE WITNESS: Yes, Your Honor.

17 THE COURT: You are still under the same oath to read
18 accurately.

19 You may proceed when ready, Mr. Adams.

20 THE WITNESS: Your Honor, may I get a copy of the
21 Call transcript too, please?

22 THE COURT: Yes.

23 (The deposition excerpts were read into the record as
24 follows:)

25

J. Call - Deposition Excerpts

1 DIRECT EXAMINATION

2 BY MR. ADAMS:

3 Q Would you please state your full name for the record.

4 A Justin Call.

5 Q All right. Who is your current employer?

6 A ViSalus. I'm employed by ViSalus.

7 Q Okay. What's your current job title?

8 A VP of sales and global support.

9 Q How long have you held that title?

10 A That title?

11 Q Yeah.

12 A I mean, it has essentially been the same title for
13 five-and-a-half years; close to five-and-a-half years.

14 Q Okay.

15 A The titles get adjusted here and there, but the nature of
16 VP of support has been the same for the whole time.

17 Q Have you held any other positions at ViSalus?

18 A No.

19 Q All right. What were your job duties and responsibilities
20 in -- when you started in 2011?

21 A Primarily it was the call center, and I mean there was a
22 lot -- I don't know how detailed you want me to get, but that
23 was the primary purpose.

24 Q And that includes inbound and outbound?

25 A At the time we only had inbound.

J. Call - Deposition Excerpts

1 Q When was the -- is it called Outreach Support? Is that
2 the Outbound Call Center?

3 A That was the terminology that they kind of came up with,
4 yes.

5 Q So I want to talk about the outreach team -- what's the
6 best term that I should use just to make sure you and I are
7 clear about what I'm referring to?

8 A "Outreach" is fine.

9 MR. ADAMS: Mr. Robertson, if you could slow down on
10 the reading.

11 BY MR. ADAMS:

12 Q Okay. By "outreach team," I understand that to mean a
13 group within ViSalus that places outbound calls is that --

14 A Yes.

15 Q -- accurate?

16 A Yes.

17 Q Okay. So that team was created in 2012 sometime?

18 A Yes.

19 Q Can you give an estimate on a month?

20 A I believe first quarter of 2012, to the best of my
21 remembrance.

22 Q Understood. It's five or so years ago?

23 A Yeah.

24 Q At its inception what was the purpose of the outreach
25 support team?

J. Call - Deposition Excerpts

1 A To call declined credit cards; people whose credit cards
2 declined on auto-ship.

3 Q Okay. What was the next responsibility that was added to
4 the outreach team?

5 A We did various campaigns, you know, including -- we did,
6 like, upsell campaigns, people that were on, you know, one kit
7 to -- when we came out with a new kit, we called them to let
8 them know about the new kit. And then we also would have,
9 like, a WinBack, you know, people that hadn't ordered, to let
10 them know about a special that if they wanted to come back on
11 the challenge. Those were probably the three main things.

12 Q The WinBack campaign started in 2013; is that correct?

13 A I honestly have no idea. We could have -- as far as --
14 mostly WinBack campaign was not generally an outbound campaign.
15 WinBack existed without any outbound. It was a marketing
16 email, you know, a social campaign primarily. That was the --
17 that was how it was created.

18 Q And you were supervising or maybe one step above
19 supervising the outreach team in 2012, right?

20 A Yes. That was the genesis for starting the outreach team,
21 was to have a structured way of calling people whose auto-ships
22 declined. That was the purpose of creating that.

23 Q Okay.

24 A Rather than, you know, people in between calls maybe
25 calling somebody, you know. It was hit or miss. The outreach

J. Call - Deposition Excerpts

1 team was created to have a professional structured way to call
2 the people whose cards were declined as a courtesy.

3 Q Okay. And to make it systematic so that any time a credit
4 card was declined they would get a call, right?

5 A Correct.

6 Q And then at some point the outreach team started also
7 making the same sort of systematic calls to people as part of a
8 WinBack campaign, right?

9 A That was added as well. I mean, the core foundation was
10 always the credit card declines based on sheer numbers. That
11 was by far and away the largest population of work and people.
12 But then we did add, you know, as we've talked about, other
13 campaigns for certain people to call as well.

14 Q Were you involved in adding those additional campaigns?

15 A Yes.

16 Q Were you involved in adding the WinBack campaign?

17 A Sure.

18 Q Also the fuel kit upgrade?

19 A Yes.

20 Q Okay.

21 A To the extent of what you're saying "involved" means --
22 from a strategic standpoint, yes.

23 Q Your role was more at the high-level strategic, saying, we
24 should call people who haven't placed orders in a while, and
25 then somebody would go and pull a list of names that hadn't

J. Call - Deposition Excerpts

1 placed orders within a specified time period, right?

2 A So we -- as I mentioned earlier, the WinBack campaign was
3 a -- was a promotion, so to speak, irregardless of any outbound
4 calling we did. It was more of a marketing campaign to get
5 people. But because we had this outbound function, we said,
6 you know what, that's -- that would be a great tool and great
7 courtesy to let people know that we have a 50 percent discount
8 if they want to come back on the challenge.

9 Q Okay.

10 A So it was an added component to an already existing
11 WinBack campaign that we had done for a long time, if that
12 makes sense.

13 Q Okay. Do you know what a Progressive Outreach Manager is?

14 A Yes.

15 Q Okay. What is it?

16 A I've never heard it called that exactly but --

17 Q Have you heard it referred to as POM or P-O-M?

18 A Yes.

19 Q Okay. So if I use that term, POM, P-O-M, you have an
20 understanding about what I'm referring to, correct?

21 A I do.

22 Q And what's your understanding?

23 A It is -- it's a dialer.

24 Q Okay. And that's a functionality within the Avaya system,
25 correct?

J. Call - Deposition Excerpts

1 A No. It's an addition.

2 Q Okay. So when you say "dialer," what do you mean by that?

3 A It means instead of you having to push the buttons
4 yourself, it can dial it for you.

5 Q Okay. And when did ViSalus begin to use POM?

6 A Boy, it took forever to get going. I think it was
7 probably -- I just don't really -- it was probably '14, I would
8 think; maybe '13. It took -- I'm thinking it took -- might
9 have been beginning of '14 by the time it actually got going,
10 but I don't honestly recall if the -- yeah.

11 Q Okay. What was the purpose of using POM?

12 A So you didn't have to dial the phone manually.

13 Q Okay. Do you know when ViSalus stopped using POM?

14 A Just probably around the coincide of the time that we
15 stopped doing the outreach.

16 Q Okay.

17 A So somewhere end of whatever we decided -- end of '15. We
18 may have even stopped using that beforehand.

19 Q Okay. What sort of campaigns did ViSalus use POM for?

20 A Same campaigns we already discussed.

21 Q That would be the WinBack campaign, fuel kit upgrade,
22 cancel credit cards?

23 A And declined credit cards.

24 Q Okay. Then in terms of the creation of these lists, and I
25 understand that you might not have been involved at the very

J. Call - Deposition Excerpts

1 granular level, those phone numbers and the names of the people
2 to be contacted, that would have been pulled from a ViSalus
3 database?

4 A Yes.

5 Q What were the main campaigns where ViSalus would have
6 manually dialed numbers?

7 A Once we had POM, I'm not aware of -- I mean of a campaign
8 that would manually dial? It would be -- that's the point of
9 having it, so you don't have to manually dial.

10 Q Okay. What about circumstances after you've had POM where
11 you would have manually dialed numbers?

12 A I mean, there is a number -- tons of different ways.
13 You're calling somebody back that had an issue. You're -- I
14 mean, you know, you got an email, and somebody asked you to
15 call them. I mean, on my cell, I used 5- to 6,000 minutes on
16 my cell phone every single month with ViSalus because somebody
17 needs to talk to you about -- or, you know, you're going to an
18 event. There are countless ways that you are calling somebody
19 on a phone manually.

20 Q But those would be more one-off situations rather than --
21 or in contrast to the larger scale of campaigns that we've
22 discussed?

23 A Once we had POM, I'm not aware of any organized campaign
24 that would be done manually, to my recollection.

25 Q Because for -- if you're going to be calling a lot of

J. Call - Deposition Excerpts

1 people, it is way more efficient --

2 A Exactly.

3 Q -- to use POM?

4 Let's talk about prerecorded messages. Do you
5 understand what I mean by "prerecorded message"?

6 A A message that was recorded previously.

7 Q And then was sent to somebody over a telephone. That
8 would be the specific context --

9 A Okay.

10 Q -- that I'm looking at here.

11 Are you aware of whether ViSalus ever used
12 prerecorded messages as part of its campaigns?

13 A I am aware, yes.

14 Q Okay. When did ViSalus begin using prerecorded messages?

15 A I have no idea. Yeah, I have no idea. I mean, it would
16 have been during the time we had POM that we were using POM.

17 Q Okay.

18 A When I say that, not at the beginning of using POM. I'm
19 saying it would have been within the -- it was in association
20 with POM for the most part that I'm aware of.

21 Q Because it wouldn't make sense to manually dial and --

22 A And play, you know, prerecorded messages, yeah.

23 Q Okay. And any WinBack campaign that was conducted after
24 POM became operational would have been run through POM, right?

25 A To -- that's -- logically that's what I would assume, yes.

J. Call - Deposition Excerpts

1 Q I've handed you a document that's marked as Exhibit 58.
2 Do you know what this document shows?

3 A It appears to be a list of .wav files.

4 Q Do you recognize the name of any of these .wav files?

5 A I recognize some of the names contained within the file
6 names, yes.

7 MR. ADAMS: Your Honor, at this time we would offer
8 Exhibit 58.

9 THE COURT: We previously discussed that as well.
10 Any additional comments from defendant?

11 MR. O'NEAL: No. Just renew the objection.

12 THE COURT: All right. Then the objection is
13 overruled. 58 is received in evidence.

14 BY MR. ADAMS:

15 Q Okay. What do you mean by that?

16 A What I mean is Nick Sarnicola. I recognize that name and
17 others: Rachel Jackson, Kevin Merriweather and certain
18 employees. Some I don't recognize.

19 Q Okay. Do you have any understanding about what these .wav
20 files would be?

21 A I mean, based on the names, I can come to an educated
22 conclusion, but I don't know of a certainty of what they all
23 are, but it looks like they're -- a .wav file is an audio file.
24 And based on the descriptions, I can make a guess on what they
25 are .wav files of.

J. Call - Deposition Excerpts

1 Q These look to be audio recordings of messages of a WinBack
2 campaign. Some of them are, though, right?

3 A Some appear that potentially they are.

4 Q Okay. So when a campaign was started and people were
5 receiving calls, say a WinBack campaign, do you have an
6 understanding as to what the first thing that the call
7 recipient would hear would be?

8 A I don't.

9 Q Okay. Do you know what a Press 1 campaign is?

10 A Yes.

11 Q What is a Press 1 campaign?

12 A It's -- you press 1 to be connected to a live person now.

13 Q Is that typically how WinBack campaigns were done?

14 A There was no typical -- you know, just tried to find the
15 best -- best way to reach people. Phone is a tough -- is not
16 what it once was to contact people. So you just look for ways,
17 you know, to reach people.

18 Q When did ViSalus operate Press 1 campaigns?

19 A I -- I mean, during that time period with the -- sometime
20 in that small time period with POM.

21 Q Are you familiar with the disposition codes that were used
22 for various calls placed by the outreach team?

23 A I'm familiar with the term "disposition codes."

24 Q Okay. Do you -- have you ever seen a list of the various
25 disposition codes?

J. Call - Deposition Excerpts

1 A Specifically to ViSalus?

2 Q Correct.

3 A I would assume I have, but I don't recollect a specific
4 time looking at them.

5 Q What's the point -- what's the purpose of having
6 dispositions or disposition codes when you're placing an
7 outbound call campaign?

8 A To characterize the outcome of that call.

9 Q I want to show you a document and the file name is
10 April2015_WinBackP20. I guess, first off, do you have any
11 understanding about what that file name refers to?

12 A WinBack in April.

13 MR. ADAMS: Your Honor, I would like to offer and
14 publish Exhibit 38-15.

15 THE COURT: 38-15. One moment. All right. We have
16 discussed that previously.

17 Any additional comments from the defendant?

18 Objection preserved.

19 MR. O'NEAL: Just to renew the objection, Judge.

20 THE COURT: All right. Thank you. Overruled.

21 38-15 is received in evidence, and you may show the
22 jury.

23 MR. ADAMS: Thank you, Your Honor.

24 BY MR. ADAMS:

25 Q Okay. And the "P20" portion of the name?

J. Call - Deposition Excerpts

1 A I don't know.

2 Q Okay. So here is the document, and this is a spreadsheet.
3 Can you see that all right?

4 A Uh-huh.

5 Q So the first column says "ID," and that would refer to the
6 customer or promoter ID?

7 A I don't know. It is a little bit different format, and so
8 I don't know if that's the case or not. It could be a call --
9 some sort of a call ID based on looking at -- there's
10 dispositions attached to it.

11 Q And when you say "there's disposition attached to it,"
12 that's the column entitled "Reason"?

13 A I'm making an assumption.

14 Q Okay. These look like dispositions that ViSalus would use
15 for dispositioning a call, right?

16 A Yeah. They look like dispositions that a call center
17 would use.

18 Q Is -- the first one here says "answering machine." That's
19 a disposition code that is pretty intuitive, right? That would
20 be if the call goes to an answering machine?

21 A Correct.

22 Q And then there is no answer in the second disposition,
23 which I would also understand would be pretty intuitive, right?

24 A Yes.

25 Q So based on this, it looks like there are records saved by

J. Call - Deposition Excerpts

1 month and year and campaign type here. April 2015, a WinBack
2 campaign, and the spreadsheet then would indicate the results
3 of calls by disposition, right?

4 A I mean, that appears -- at least at a point in time this
5 was pulled -- the result of a series of calls is what this
6 appears to me to be.

7 Q What is "disconnected by user"? That's a disposition here
8 in column D, row 20 of this file. What does that refer to?

9 A I don't know. I could guess, but I don't really -- it
10 doesn't really make sense, so I don't know.

11 Q For example, "Rachel WinBack" that would appear to be --

12 A Correct.

13 Q -- part of a WinBack campaign?

14 A When it says "WinBack," that would appear to be, yes.

15 Q Same for the last two: WinBack_Voice_Case_With_Neon.
16 WinBack_Customer_Promoter_Lucero_recorded?

17 A I would guess the ones that say "WinBack" or for that
18 purpose, yes.

19 MR. ADAMS: No further questions at this time,
20 Your Honor.

21 THE COURT: All right. Does the defendant have
22 questions that they have asked Mr. Justin Call?

23 MR. O'NEAL: Yes, Your Honor.

24 THE COURT: Very good. You may proceed.
25

J. Call - Deposition Excerpts

1 CROSS-EXAMINATION

2 BY MR. O'NEAL:

3 Q And the outreach team was terminated in January of 2016?

4 A If that's the information that you have. I don't recall
5 exactly.

6 Q Okay. Was it --

7 A I have no reason to dispute if you got that information.
8 I don't recall exactly.

9 Q Does that sound approximately right to you?

10 A Yeah. It sounds -- yeah, it sounds right.

11 Q Okay.

12 A If I were to guess, I would have thought it was before
13 then, like the end of 2015.

14 Q And the other campaigns that the outreach team was placing
15 calls in relation to would have been for declined credit cards?

16 A That's the primary function.

17 Q And you were supervising or maybe one step above
18 supervising the outreach team in 2012, right?

19 A Yes. That was the genesis for starting the outreach team,
20 was to have a structured way of calling people whose auto-ships
21 declined. That was the purpose of creating that --

22 Q Okay.

23 A -- rather than, you know, people in between calls maybe
24 calling somebody. You know, it was hit or miss. The outreach
25 team was created to have a professional structured way to call

J. Call - Deposition Excerpts

1 the people whose cards were declined as a courtesy.

2 Q Okay. And to make it systematic so that any time a credit
3 card was declined they would get a call, right?

4 A Correct.

5 Q Okay. How would you figure out what the date range is for
6 a Press 1 campaign?

7 A I would ask one of the technical people that would
8 probably tell you the first time that went live. It was a very
9 short time. It took a long time to get the technology to work.

10 Q So I understand that the timeline is generally something
11 as follows: You started working at ViSalus 2011, 2012. They
12 started the outreach team --

13 A Uh-huh.

14 Q -- 2013, 2014. You started using POM; is that right?

15 A Yeah, somewhere in that range. I don't recall the POM
16 dates exactly, but October 2012 we started -- got the Avaya for
17 inbound and then, you know, some --

18 Q Do you know when or what telephone system ViSalus and the
19 outreach team were using starting in 2012?

20 A Just the -- we just dialed on the phones manually at the
21 inception of it.

22 Q Starting in 2012 do you know what the device is that were
23 used by the outreach team for placing calls?

24 A Telephones. It was just -- it was just a regular
25 telephone.

J. Call - Deposition Excerpts

1 Q Okay. Do you know if that was part of Avaya telephone
2 system that I understand you were using up until recently?

3 A We -- so when we started, we didn't have the Avaya system.
4 So we just had -- it was a ShoreTel manual dialed phone. You
5 just picked it up and dialed when the outreach team first
6 started.

7 Q When did the Avaya system -- strike that. When did
8 ViSalus begin to use an Avaya system?

9 A In October of 2012.

10 Q Are the devices that you began using in October of 2012,
11 are they Avaya devices?

12 A Yes.

13 Q Okay. And then so I guess walk me through the changes to
14 how the outreach team placed calls between October 2012 and
15 when it ended. What was -- what was -- what was the next
16 change after you acquired the Avaya devices in October of 2012?
17 Do you understand?

18 A Not really the way you're asking. I think it has been
19 established the devices were phones that were, to the best of
20 my knowledge, manufactured by Avaya instead of Avaya on the
21 phones.

22 Q Okay.

23 A It was an Avaya phone system and Avaya devices.

24 Q So you would be able to look at a record of a specific
25 call and figure out from the disposition code whether the

J. Call - Deposition Excerpts

1 number was busy or, generally, from that disposition, figure
2 out the outcome?

3 A To the extent that the employee dispositioned it
4 correctly.

5 Q Yeah. Subject to human error?

6 A Correct.

7 Q The record of the call would reflect its outcome via its
8 disposition code?

9 A In theory that's the idea of a disposition, yes.

10 Q Okay. And the difference between the theory of it and the
11 practice of it is that sometimes humans make mistakes; is that
12 right?

13 A To the best of my knowledge, yes. Humans make mistakes
14 absolutely, and humans cheat and do it wrong and mislead and
15 all those other things in a call center. You know what I mean?
16 Somebody could -- like I said, they don't want to say that they
17 got a "no," and so they'd put it as "busy" every time.

18 Q But more likely than not the disposition code would be
19 correct?

20 A That's a hard question to answer, but over time
21 statistically the dispositions are going to tell you if there
22 may be a problem from a performance standpoint over time,
23 because you are going to be able to look and compare, you know,
24 over all the other employees. Like the example I gave you, if
25 Johnny has 22 percent busies, everybody else has 2 percent,

J. Call - Deposition Excerpts

1 there may be a problem with Johnny in how he is dispositioning
2 calls.

3 Q Okay. But if you were to look at a list of disposition
4 codes, would you expect most of them to be right?

5 A What I'm saying, if I looked at it, if I looked at a
6 summary of dispositions, I would be able to statistically tell
7 if an individual is, or if there may be an issue or something.
8 It's a performance metric. It is a way to look and see if
9 something is outside the norm.

10 Q Okay. It is useful definitely for looking at individual
11 performance. I get that. Isn't it also useful for looking at
12 the campaign performance?

13 A Sure. I mean if -- from campaign to campaign, it's a way
14 to establish a track -- a track record of a campaign. You
15 know -- so, I mean -- but it is a -- meaningless in and of
16 itself, because if you got 50 percent of the numbers are busy
17 on a campaign, you may think that's weird. But maybe that's
18 the reality of that particular campaign. If you do another
19 campaign, and there's only 1 percent busy, then you might go,
20 that's strange. It is just a means to say -- to look further
21 into something so -- just like any profession.

22 Q Okay. So I want to put this document next to an earlier
23 exhibit that I showed you with the audio filings. Do you
24 recall that?

25 A That would be Exhibit 3?

J. Call - Deposition Excerpts

1 Q Yes. Looking at this, is there any way you can figure out
2 whether any of these audio files are connected with any of the
3 spreadsheets in Exhibit 5?

4 A No.

5 Q Okay. But you were never involved in the creation of
6 spreadsheets for purposes of the WinBack campaign, right?

7 A No. I didn't create spreadsheets to put on the dialer
8 for -- to put on POM for the WinBack campaign. I have been the
9 recipient of spreadsheets to send out to leaders so they could
10 go after their own win-backs, which is what this looks like to
11 me, based on the title. So, you know, somebody gives me,
12 "Here's Patricia Robins' eligible list of WinBack." I would
13 email that to Patricia and say, "Hey, Patricia. Here is all of
14 your people eligible for the WinBack," and then she knows who
15 they are.

16 Q Well, I mean based on the --

17 MR. ADAMS: Your Honor, I just noticed. I got this
18 today. This starts with an answer. There is no question with
19 this.

20 THE COURT: Let me ask, Mr. O'Neal, can you tell us
21 what the question is?

22 MR. O'NEAL: Let me grab the deposition.

23 THE COURT: Why don't you first show Mr. Adams the
24 question and see if there is any objection to reading the
25 question from either side.

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1 MR. O'NEAL: Sure. May I approach the witness,
2 Your Honor?

3 THE COURT: You may.

4 Mr. Adams, any objection from plaintiff to reading
5 the question?

6 Mr. Adams?

7 MR. ADAMS: No objection. I'm sorry, Your Honor.

8 THE COURT: Mr. O'Neal, any objection from defendant
9 to reading the question?

10 MR. O'NEAL: No.

11 THE COURT: All right. You may proceed.

12 BY MR. O'NEAL:

13 Q Okay. And some of these .wav files identify individual
14 promoters, right, like Rachel Jackson, correct?

15 A Most of them do.

16 Q Okay. And some of them even identify dates or years,
17 correct?

18 A Yes.

19 Q So it would be reasonable to assume that a WinBack
20 campaign conducted in a certain time frame, if there is a -- by
21 a certain promoter -- say, if Rachel Jackson was doing a
22 WinBack campaign in April of 2015, and there was a recording of
23 Rachel Jackson from April of 2015, that that recording would
24 have been used in connection with that spreadsheet?

25 A That's drawing a lot of conclusions. I don't see anything

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1 that specific, so I don't know how to answer that.

2 Q George Berry (phonetic) would be the best person to ask?

3 A Well, I mean, based on the file names, I don't see
4 anything that specific to that, you know, that says like 2015.
5 So the file -- I mean, the .wav file is a recording. So you
6 can assume that that was used to -- on a call. But these other
7 files, I mean, these types of files, there is no -- we have --
8 these kinds of files exist always, you know. I mean, they have
9 nothing to do with phone calls. So they call, you know -- you
10 could upload them to that. These files exist even if no phones
11 existed.

12 Q So when you say "these files exist," you are talking about
13 the spreadsheets, right?

14 A Sorry. Exhibit 5?

15 Q So those would be the spreadsheets?

16 A Correct.

17 Q Exist independently of whether calls were --

18 A Correct.

19 Q -- placed or not?

20 THE COURT: All right. So does that take care of the
21 deposition excerpts of the deposition of Mr. Justin Call?

22 MR. ADAMS: Yes, Your Honor.

23 THE COURT: All right. Thank you.

24 Do you have another deposition coming up?

25 MR. DOVEL: Yes, Your Honor. Before that we want to

1 offer in evidence Exhibit 37, the Gidley declaration.

2 THE COURT: All right. We have talked about that
3 previously.

4 Anything further from defendants I should consider?

5 MR. O'NEAL: Renew the objections, Judge.

6 THE COURT: All right. The objection is overruled,
7 and I receive in evidence Exhibit 37.

8 MR. DOVEL: We want to offer in evidence the rest of
9 Exhibit 38. The last witness we did 38-15. So we want to also
10 include 38-1 through 38-14 and 38-16 through 38-405.

11 THE COURT: 38-1 through 14 and 38-1 through 405. I
12 think we need to discuss this.

13 So let's take a 15-minute break, members of the jury.

14 THE COURT: Mr. Robertson, you are welcome to step
15 down if you wish.

16 (Open court; jury not present:)

17 THE COURT: All right. Why do you want to offer 404
18 exhibits? Let me say this in preface: If it is to lay a
19 foundation for the summary of 36, I just think that the summary
20 rule of 1006 requires that the documents be admissible. They
21 don't have to be admitted. I'm already satisfied, overruling
22 defendant's objection, that 38-1 through 38-405 are admissible.
23 So I think that satisfies at least that prong of the Rule 1006
24 summary exhibit requirement.

25 I am really worried and skeptical about giving 405 of

1 these electronic files that contain millions and millions of
2 lines of data to a jury that they won't know what to do with.
3 I don't want to have them spend the next two or three weeks
4 during deliberations looking through all of this.

5 So why do you want 405 of these electronic files
6 received in evidence? And if it was really just to make sure
7 that you have got an adequate foundation for your summary
8 exhibit, I find that you do. They don't need to be received in
9 evidence.

10 MR. DOVEL: Yes, Your Honor. Two comments: One is
11 there are specific spreadsheets and lines that we are going to
12 tie together in closing argument, and so we need those to tie
13 together.

14 THE COURT: How many different exhibits are those?

15 MR. DOVEL: I don't know. It is probably on the
16 order of -- I just don't know. Maybe 50.

17 THE COURT: 50?

18 MR. DOVEL: Yes, Your Honor.

19 In addition, with respect to the concern about the
20 jury, I've had probably half a dozen cases where we have
21 submitted laptops with spreadsheets on them, and the jurors
22 don't even get involved with them. It is not a paper document.
23 They really don't turn to it. I don't anticipate Your Honor's
24 problem.

25 THE COURT: What is defendant's position?

1 MR. O'NEAL: I think you are right, Judge. It is
2 cumulative. It is going to confuse the jury. That was the
3 purpose of using the summary.

4 THE COURT: Let me ask, Mr. Dovel, this question: If
5 you're right, and it doesn't confuse the jury in deliberations,
6 then, fine. No harm; no foul. If we were, however, to get a
7 question during jury deliberations, "Are we expected to review
8 all of the Exhibits 38-1 through 405 and look add up the
9 numbers and look at these numbers ourselves," can you commit to
10 me now that plaintiff's position is I can tell the jury, "No,
11 you don't need to do that. That is not part of your
12 responsibility"?

13 MR. DOVEL: Here is what I can commit to, Your Honor:
14 If 36A and B are in as summaries, then I'm confident that I can
15 give that commitment. But I don't know where we are going to
16 wind up in the trial. We may need these as our primary
17 evidence.

18 THE COURT: But we can't have the jury manually
19 adding up millions of lines of text. They will be here for
20 weeks. We can't have that.

21 MR. DOVEL: I understand, Your Honor. That's not
22 ideal. We think we could cover it with the summaries. But
23 again, there are certain things we would like to show the jury
24 in closing argument to tie things together. For example, we
25 want to tie together the proof that shows that Ms. Wakefield

1 got prerecorded messages using ViSalus's own exhibit.

2 THE COURT: How do you need 50?

3 MR. DOVEL: We don't need it for that. That's going
4 to require something like seven documents. But we have got
5 some other things that we would like to do with those.

6 THE COURT: Federal court is not the place for trial
7 by ambush. Some state courts are, but not federal court.

8 MR. DOVEL: I understand, Your Honor.

9 THE COURT: How long do you anticipate your closing
10 argument will be?

11 MR. DOVEL: Mr. Franzini is going to do the
12 initial --

13 MR. FRANZINI: Less than an hour, Your Honor.

14 THE COURT: Okay. Here is what I'm going to do: I
15 will limit your closing argument to one hour, because I'm not
16 going to let you spend hours and hours and hours on these
17 exhibits. So closing argument -- not the rebuttal -- closing
18 argument will be limited to one hour. I'll just tell you now,
19 even if I'm not going to get your commitment, if the jury asks
20 during deliberations that they have to review all 405 of these
21 electronic spreadsheets or do the counting or tabulations
22 themselves from these documents, I'm going to tell them no,
23 even if it is over your objection. Based upon that
24 announcement and telling you what I would be ruling, I will
25 receive in evidence over defendant's objection Exhibits 38 --

1 all of 38, which is 1 through 405.

2 MR. DOVEL: Your Honor, we also offer into evidence
3 Exhibits 39 and 40, which are two additional contact lists.

4 THE COURT: I don't recall those.

5 MR. DOVEL: 39 is an electronic document, a
6 spreadsheet.

7 THE COURT: How many lines on that?

8 MR. DOVEL: It is same sort of format; same sort of
9 documents as 38, electronic contact lists.

10 THE COURT: What's the difference between 39 and 38?

11 MR. DOVEL: 38 has certain contact lists that were
12 identified by Mr. Gidley. 39 and 40 are two additional contact
13 lists that were used with POM for WinBack that other documents
14 identify. These were produced by ViSalus in their business
15 records.

16 THE COURT: What's ViSalus's position on 39 and 40?

17 It appears -- I'll accept plaintiff counsel's
18 representation that they were produced by defendant from
19 defendant's records and appear to satisfy the business records
20 exception. Any other objections from defendant?

21 MR. O'NEAL: No, Judge. But I will tell you I'm
22 confused, because as I understood counsel to be saying that he
23 was going to point to spreadsheets which have the plaintiff's
24 name in them or her husband's name, and that's Exhibits 39 to
25 40. I think there is only one other one in the 50 or so that

1 he just wanted to move in in which the name is there. So I'm
2 not quite following where we are going.

3 THE COURT: I think it sounds to me like he is
4 basically trying to do a little bit of trial by ambush and put
5 in 405 exhibits that will have millions of lines of text and
6 not going to tell you what its relevance is until closing
7 argument. That's what I'm hearing.

8 MR. O'NEAL: Well, Judge, that sounds terribly unfair
9 and prejudicial, and I would object to it.

10 THE COURT: I want to talk now about 39 and 40.
11 Any specific objections?

12 MR. O'NEAL: Just the same ones, Judge.

13 THE COURT: I'm going to allow 39 and 40.

14 MR. DOVEL: Your Honor, at this time we want to offer
15 Exhibit 44. It is a set of WinBack scripts that were produced
16 by ViSalus in ViSalus's business records.

17 THE COURT: Any objection to 44?

18 MR. O'NEAL: Same objection as before.

19 THE COURT: Remind me what that is. These are
20 business records from defendant, right?

21 MR. DOVEL: Yes, Your Honor.

22 THE COURT: What's the basis of the objection,
23 Mr. O'Neal?

24 MR. O'NEAL: Relevance and foundation, Judge.

25 THE COURT: All right. These are WinBack campaigns.

1 Are they not from the relevant time period?

2 MR. O'NEAL: Well, Judge, they don't have a pertinent
3 time period on them, and that's the issue. The plaintiff never
4 obtained any testimony showing when they were used, how they
5 were used, or when they were used.

6 THE COURT: Plaintiff's response.

7 MR. DOVEL: The specific relevance is that there is
8 an example of a Press 1 WinBack script in here, which is on
9 page 4. So we know that Press 1 is in the relevant time
10 period, and it is a WinBack script. It's obviously very
11 relevant.

12 THE COURT: All right. In light of Ms. Wakefield's
13 testimony, I'll allow 44. 44 is received as well.

14 Anything else?

15 MR. DOVEL: Nothing at this time.

16 THE COURT: We will bring the jury back in about five
17 minutes.

18 (Recess.)

19 (Open court; jury not present:)

20 THE COURT: So I do have the full script for
21 Mr. Gidley, right, what you handed up?

22 MR. DOVEL: That is for plaintiff's.

23 THE COURT: Right.

24 MR. O'NEAL: Judge, we have got an objection here.

25 Mr. Foster has --

1 THE COURT: Mary, one moment. The defense is raising
2 an objection.

3 MR. O'NEAL: This happened on the last reading. But
4 when we look at the script that we were provided, it makes a
5 note and says, okay, the witness is talking about this exhibit,
6 which is Plaintiff's 56. But the exhibit was never marked as
7 part of the deposition.

8 So they are reading things, purporting them to be
9 exhibits to the depo., when, in fact, they are not. What
10 appears is going to happen is they are now going to play audio
11 clips and use other documents that they haven't ever marked.

12 THE COURT: Turn to page 28 of Scott Gidley.

13 MR. O'NEAL: 28, yes.

14 THE COURT: It is on page 13. 28 of the transcript;
15 13 of what we were given.

16 You see where the question is -- if we could mark
17 that one as bracket P34-A?

18 MR. O'NEAL: Yes.

19 THE COURT: I am assuming, and somebody tell me that
20 my assumption is incorrect, that was actually marked as a
21 deposition exhibit in Gidley's deposition -- maybe not as 34A.
22 But what the document that has now been marked as 34A is that
23 same document. Is my assumption incorrect?

24 MR. O'NEAL: I think it is, Judge.

25 MR. DOVEL: You're right, Your Honor.

1 THE COURT: Wait a minute. Mr. Dovel is saying that
2 my assumption is correct; Mr. O'Neal is saying that it is not.
3 Now, let's go figure it out. Let's take a look at the original
4 deposition of Gidley and the original deposition of Gidley.
5 Let's go to page 28. I do not understand how the parties can
6 disagree on this point. One side is right; one side is wrong.

7 Let's take a look at Gidley, page 28. Now 28, it
8 looks like line 11 or line 10, Mr. Lawson is saying,
9 "All right. Jodi, if we could, there's a document. It is a
10 large document. It says, 'Using Proactive Outreach Manager' on
11 the front of it. If we could mark that one as Gidley 19."
12 Then line 11 says, "Exhibit 19 is marked."

13 Now, if Exhibit 19 is the same as 34A, then Mr. Dovel
14 is correct, and we do not have a problem. If Exhibit 19 is not
15 the same as 34A, we have a really big problem.

16 So, Mr. O'Neal, is 19 the same as 34A?

17 MR. O'NEAL: Well, Judge, we are trying to pull it
18 back and read it back. But what caught my attention, and I
19 can't answer your question specifically about this exhibit.
20 But when we were getting ready to have Gidley read in, which is
21 what they are about to do, within that deposition, for example,
22 they will say something like, "I'm going to read you or play
23 you this file," and they never mark the file as an exhibit.

24 THE COURT: Then that can't be played.

25 MR. DOVEL: Your Honor, the transcript contains the

1 full audio of the file.

2 THE COURT: Give me an example. I have got the
3 transcript in front of me. Give me a page number.

4 Mr. O'Neal, can you give me an example of the Gidley
5 excerpts where you see this?

6 MR. DOVEL: If you turn to page 6, you'll see the
7 audio clip is transcribed.

8 THE COURT: All right. Give me one moment. That's
9 referring to page 176 of the Gidley deposition, right?

10 MR. DOVEL: Then at the end it gives the name of the
11 file as well.

12 THE COURT: All right. I'm looking at the Gidley
13 deposition, page 176. This document can be found at ECF 265-2.
14 I'm looking at page 176. It says, "All right. I want to play
15 a couple of clips for you." Then the audio clip is
16 transcribed.

17 All right. I see that transcription. Now, you were
18 saying, Mr. Dovel -- how do we link that to make sure that that
19 is Plaintiff's Exhibit 43-24?

20 MR. DOVEL: Because when we listen to 43-24, it is
21 the exact same transcript. In addition, 43-24 is a file name,
22 and that file name is also on the deposition record on page
23 178.

24 THE COURT: What line on 178?

25 MR. DOVEL: Line 2.

1 THE COURT: Got it. Okay. So are there any of these
2 instances, Mr. O'Neal, where the exhibit was not marked, an
3 audio was played, and you're telling me that the audio clip
4 that was transcribed does not match up with the exhibit that
5 Mr. Dovel wants to play?

6 Mr. Foster.

7 MR. FOSTER: Well, Your Honor, we are certainly
8 looking for that right now. What caught our eye was in the
9 Justin Call deposition; specifically the Justin Call
10 PowerPoint.

11 THE COURT: I'll follow along with Mr. Gidley, the
12 transcript, and make sure it is right. If you conclude that
13 there was something inappropriately played with Justin Call,
14 call it to my attention, and I may very well strike it from the
15 record and instruct the jury to disregard, but only if it
16 doesn't fit within these parameters of either being a marked
17 deposition exhibit that correlates to the exhibit being offered
18 or where it's an audio clip where we have the transcript in the
19 record if it doesn't match up.

20 MR. FOSTER: Very well. Thank you, Your Honor.

21 THE COURT: All right. Let's bring in the jury.

22 (Open court; jury present:)

23 THE COURT: Welcome back, members of the jury. I
24 understand, Mr. Dovel, that there is another deposition set of
25 excerpts that you wish to have read. This is from the

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1 deposition of Scott Gidley; is that correct?

2 MR. DOVEL: That's correct.

3 THE COURT: Mr. Robertson, you are still under oath
4 to read correctly.

5 THE WITNESS: Yes, Your Honor.

6 THE COURT: You may proceed, Mr. Dovel.

7 (The deposition excerpts were read into the record as
8 follows:)

9 DIRECT EXAMINATION

10 BY MR. DOVEL:

11 Q Could you please state your full name for the record?

12 A Scott, S-C-O-T-T; Alan, A-L-A-N; Gidley, G, as in George,
13 I-D, as in David, L-E-Y.

14 Q Who is your current employer?

15 A ViSalus.

16 Q How long have you worked for ViSalus?

17 A Since August of 2011.

18 Q What is your current job title?

19 A Compliance analyst and fraud investigator.

20 Q What are your job duties and responsibilities?

21 A I investigate credit card fraud, essentially loss
22 prevention for the company. As a compliance analyst, I
23 investigate alleged violations of our policies and procedures
24 and enforce the policies and procedures, as necessary. This is
25 on behalf of our promoters, not our employees.

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1 Q And you understand that you are testifying on behalf of
2 ViSalus?

3 A Yes.

4 Q How do promoters come to be engaged with ViSalus?

5 A It is a network marketing company, so they would have
6 their friends, family members, introduce them to the products,
7 discuss being a customer, potentially having a side business,
8 becoming a promoter.

9 Q So ViSalus promoters then recruit other promoters?

10 A And customers, yes.

11 Q When promoters sell ViSalus products, the promoter gets a
12 commission based on what's sold and ViSalus also makes money
13 off of the sale of that product, right?

14 A Yes.

15 Q That's how multilevel marketing works?

16 A That's how many businesses work.

17 Q All right. I'm going to show you a document, which was
18 previously marked as Exhibit 15. Have you ever seen this
19 document before?

20 A Yes.

21 Q Do you know what it is?

22 A Yes.

23 Q What is it?

24 A An independent promoter application from 2011.

25 Q Someone interested in becoming a ViSalus promoter would

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1 have filled out a form like this; is that right?

2 A Or something similar in the online enrollment process.

3 Q And that's true of the sign-up process to become a
4 promoter between 2011 and the present, right?

5 A Correct.

6 Q So regardless of the time period of the information
7 contained in this form, the substance of it would have been
8 uploaded to Exigo; is that right?

9 A Yes.

10 Q Where do records of individuals who apply online, where
11 are those maintained?

12 A When someone enrolls online, then their information is put
13 into the Exigo system. Exigo is a database. It is an online
14 database.

15 Q It is a live database, right?

16 A Yes.

17 Q The information that the customer submits would be the
18 same?

19 A Essentially. Well, we don't require their Social Security
20 number.

21 Q As it relates to providing a telephone number, the
22 language would be the same?

23 A Essentially, yes.

24 Q All right. In the spring of 2015 how many call center
25 agents were employed by ViSalus?

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1 A Maybe 50.

2 Q What were the job duties and responsibilities of call
3 center agents in spring of 2015?

4 A To answer incoming phone calls, emails, and web chats.

5 Q Anything else?

6 A Not for the call center agents.

7 Q Call center agents did not place outgoing calls in the
8 spring of 2015?

9 A No.

10 Q Did anyone place outgoing calls?

11 A Yes.

12 Q Who placed outgoing calls?

13 A That would be our outreach/outbound team. I believe it
14 was outreach support.

15 Q How many individuals worked in outreach support in spring
16 2015?

17 A Less than ten.

18 Q All right. What were the job duties and responsibilities
19 of outbound agents in spring of 2015?

20 A The outbound agents are -- our outreach support was a
21 department that helps to retain customers and promoters. They
22 would make phone calls regarding declined orders. They would
23 make phone calls regarding promotions, new products. It was --
24 it was customer retention.

25 Q Who made the decision about what customers to reach out to

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1 as part of that customer retention?

2 A That would -- it would depend on what the situation is;
3 what we are talking about specifically.

4 Q All right. Give me a couple examples of situations, the
5 most common situations.

6 A The most common situation is a declined credit card. When
7 a customer or promoter has an existing order and the credit
8 card declines, we would contact them to notify them.

9 Q What about promotions?

10 A We -- our most successful promotion is our WinBack
11 promotions where customers or promoters who have not ordered in
12 90 days are eligible for a discount on a new order.

13 Q So for a WinBack who makes the decision as to who gets
14 contacted as part of that WinBack campaign?

15 A It is a function of the WinBack promotion as to who
16 qualifies for that. Again, if they haven't ordered in 90 days,
17 they're eligible. Customers and promoters are eligible for the
18 promotion.

19 Q Are you familiar with the POM system, P-O-M?

20 A I am aware that we had used it, yes.

21 Q And what -- what do you understand that system to be?

22 A It is a way that we can utilize our phone system to keep
23 in contact with our customers and promoters.

24 Q And just so the record is clear, when I say "POM," I'm
25 referring to Progressive Outreach Manager?

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1 A Yes.

2 Q That's P-O-M?

3 A Yes.

4 Q You said that around October or December 2014
5 approximately, ViSalus started using POM to place calls and
6 report numbers, and you just described for me the reporting
7 side of that.

8 How was POM used to place calls?

9 A It has a database of phone numbers to be dialed. So
10 depending on the actual campaign, those numbers would have been
11 imported.

12 Q So the database of phone numbers, that's something that an
13 agent would upload?

14 A Yes.

15 Q So an agent --

16 A Depending on the campaign.

17 Q Yeah. Generally talking about, say, a WinBack campaign,
18 they might get -- they would get a list of phone numbers
19 uploaded into POM to be dialed?

20 A Correct.

21 Q So earlier in this we used the word "campaign." What do
22 you understand the word "campaign" to mean as it relates to the
23 POM system?

24 A A campaign is a notification for a particular reason.

25 Q All right. I want to play Exhibit 43-24.

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1 (Exhibit 43-24 was played in open court.)

2 THE COURT: Hold on one moment, folks. She spoke
3 very rapidly, so I am going to put the following in the record
4 to make it easier for anybody looking at the record down the
5 road. That audio clip appears to have been transcribed at page
6 176 of the deposition, and the deposition can be found at
7 ECF 265-2. The transcription begins at page 176, line 22
8 through 177, line 24.

9 Am I correct, Mr. Dovel?

10 MR. DOVEL: That is correct.

11 THE COURT: Members of the jury, I'm really not
12 speaking to you. I'm speaking to a record so that Mr. Apodaca
13 doesn't have to worry about that fast-speaking speaker.

14 You may continue.

15 MR. DOVEL: Your Honor, I'm going to continue
16 reading. Just so there is no confusion, the reading continues
17 with the phrase "and for the record," but I'm actually reading
18 the deposition transcript.

19 THE COURT: Where are you?

20 MR. DOVEL: I'm on page 7 of the printout, which is
21 177, line 25.

22 THE COURT: One moment. That's fine.

23 (The deposition excerpts continued to be read into
24 the record as follows:)

25

S. Gidley - Deposition Excerpts

1 BY MR. DOVEL:

2 Q And for the record, the clip that I just played has a file
3 entitled "Rachel WinBack PR and customers .wav."

4 Have you ever heard that audio clip before?

5 A Yes.

6 Q All right. When did you hear that?

7 A When I found it and provided it to defendant's counsel in
8 September, October 2015.

9 Q Do you mean 2016?

10 A '16. I'm sorry.

11 Q What is that message?

12 A It's a -- it was Rachel Jackson trying to reengage
13 promoters and customers to get back to the challenge or
14 upgrade; if they were customers, to upgrade to promoters.

15 Q Who was that message sent to?

16 A Presumably it would have been sent to people on a call
17 list that was created. It would only be people in her
18 organization, so people in her down-line.

19 Q How would that message have been sent out?

20 A It would have been uploaded into the Progressive Outreach
21 Manager and then sent via telephone.

22 Q Is there a way of figuring out when this message was sent
23 out?

24 A I would have to assume, based on plaintiff's records. I
25 don't know when it was sent out. That campaign was scheduled

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1 for -- or the list was created in early 2015. The calls
2 weren't placed until March, April 2015.

3 Q Is this a message that was sent to plaintiff?

4 A I believe it would have been.

5 Q Why do you believe that?

6 A Because we've established that the landline that was
7 called had two promoters in Rachel Jackson's organizations.

8 Q Byron Wakefield canceled his subscription too, right?

9 A Yes.

10 Q Is that around the same time that Lori Wakefield did?

11 A Same time.

12 Q Do you know how many people received this voice mail?

13 A I don't.

14 Q How would you figure that out?

15 A I wouldn't be able to. I would have to make a guess based
16 on the spreadsheet that was provided or the two spreadsheets
17 potentially; one by Rachel Jackson and one by Patty Rottmann.

18 Q Do the spreadsheets have their name on them?

19 A I believe they were designated, yes.

20 Q So you would look for a spreadsheet with a name that
21 included Rachel's name or Patricia Rottmann's name?

22 A Yes.

23 Q And then you'd assume that anyone that was on that list
24 would have received that voice mail?

25 A Maybe. It would be a fair assumption.

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1 Q More likely than not?

2 A But again, those calls, just because the number was on the
3 spreadsheet, then it makes an assumption that it was uploaded
4 into the Progressive Outreach Manager and not dialed manually
5 by a call center agent.

6 So I mean, for purposes of this, then we can assume
7 that that voice mail went out to the phone numbers on the
8 spreadsheet through the Progressive Outreach Manager provided
9 there were no disruptions in processing.

10 Q All right. I'm going to play Exhibit 43-35. This one has
11 the file name "WinBack customer or promoter Lucero." That's
12 L-U-C-E-R-O, recorded.

13 (Exhibit 43-35 was played in open court.)

14 THE COURT: All right. Let me interject here for the
15 record that that audio clip can be found transcribed, also in
16 the Scott Gidley deposition, ECF 265-2, beginning at page 181
17 of the transcript, lines 2 through 23.

18 You may proceed.

19 (The deposition excerpts continued to be into the
20 record as follows:)

21 BY MR. DOVEL:

22 Q Have you ever heard that audio clip before?

23 A No.

24 Q Do you know why it was produced?

25 A Because it appears that it was the same campaign that we

S. Gidley - Deposition Excerpts

1 have been discussing.

2 Q That recording we just listened to appeared to be based
3 off the same script as the recording of Rachel Jackson, right?

4 A There were similarities.

5 Q So I believe the last question was whether that call we
6 just listened to was a prerecorded message, right?

7 A Yes.

8 Q That's a prerecorded message that you would have sent out
9 through POM, right?

10 A Yes. If it was sent, yes.

11 Q All right. I'm going to play Exhibit 43-8, a file name
12 "March EOM blast SS Smith."

13 (Exhibit 43-8 was played in open court.)

14 THE COURT: I'll interject here. That's from the
15 Gidley transcript, which can be found at ECF 265-2, page 184,
16 line 20 through 185, line 2.

17 You may continue.

18 (The deposition excerpts continued to be read into
19 the record as follows:)

20 BY MR. DOVEL:

21 Q Have you ever heard that message before?

22 A No.

23 Q Do you know what it is?

24 A It was an offer to reengage a customer.

25 Q Who would that message have been sent to?

S. Gidley - Deposition Excerpts

1 A Customers who qualified for that offer.

2 Q Okay. So what happens after the call is placed through
3 Progressive Outreach Manager?

4 A It implies speculation. I don't know. What are you
5 asking?

6 Q At some point do they -- is there a live person at ViSalus
7 on the phone?

8 A We did have Press 1 campaigns for that, yes.

9 Q Okay. So if a computer is dialing the numbers, at what
10 point, if at all, does a live representative at ViSalus become
11 involved?

12 A If you have -- again, this is -- you're asking for
13 speculation. But if a phone number -- if a phone call is made
14 through the Progressive Outreach Manager, the intention was in
15 most of these situations or most of these phone numbers is that
16 if a live person picked up the phone, that they would be
17 connected with an agent.

18 Q But it's your belief that somebody would hear that message
19 that you've described?

20 A There was a Press 1 campaign towards the end of our usage
21 of this -- of the Progressive Outreach Manager -- that would
22 introduce the call and then require the recipient to Press 1 to
23 be connected to a live agent.

24 Q And the call recipient would hear a voice say, "Press 1 to
25 be connected to a live agent"?

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1 A Yes.

2 Q Earlier you talked about a hypothetical involving 100. Is
3 that a reasonable number for an agent using a POM-uploaded
4 contact list to contact in a day?

5 A It was hypothetical, so --

6 Q Sure. But that's my question. Would that be a reasonable
7 number?

8 A Well, let's see. During an eight-hour shift, if we
9 assigned five minutes to every phone call, which includes three
10 minutes for the phone call and two minutes for documenting
11 afterwards and then going into -- going back into a ready
12 status. So that five minutes per phone call means that they
13 would be able to take care of 20 calls an hour. 20 calls an
14 hour over an eight-hour shift is 160 calls if everything were
15 ideal.

16 Q The fourth number here says, "(855)867-0325 EPS welcome
17 (outbound)." What's an EPS welcome?

18 A That's a welcome phone call to a new promoter who has
19 purchased our executive promoter system to inform of how to use
20 their Bi-Net and training materials and give them encouragement
21 about building their business and, you know, generally "welcome
22 to the company/we are excited to have you" type of call.

23 Q Okay. And those calls would have been placed through POM
24 as well, right?

25 A With the (855) number, it is possible. However, that's

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1 something that would be inefficient because of the number of
2 executive promoter systems that would come in on any given time
3 period. So I would think that -- because I have that as
4 outbound, that that was a manually dialed number, even though
5 right below it we have a local number for the same thing.

6 Q Why do you believe those were manually dialed?

7 A Because we want to give people more personal attention,
8 especially when they are purchasing the executive promoter
9 system.

10 Q How do you figure out whether those calls were placed
11 manually or through POM?

12 A No. 1, during discovery I didn't see any reports that were
13 tied to POM; No. 2, because of the amount of executive promoter
14 systems that were purchased, it would actually be a waste of
15 usage of the system itself to make those calls through Avaya
16 versus having an agent manually dial those phone numbers.

17 Q Okay. So when you are calling large groups of people with
18 the same message, then you want to use POM, right; whereas if
19 it's a smaller group, then you would manually dial them so that
20 you could deliver a personalized message?

21 A Well, again, the question or the term that we would want
22 to use, POM -- POM was available for us to use to contact large
23 groups of people. It doesn't necessarily make it any less
24 personal, you know, as far as the content of the message. It's
25 just more efficient.

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1 Q So you're saying you may have used POM. You may not have
2 used POM for the EPS welcome (outbound)?

3 A Correct.

4 Q Okay. But I was looking more at the reasoning there,
5 which is that you would want to use POM when you have a large
6 number of people you want to contact, right?

7 A Because it's more efficient.

8 Q Especially when you want to deliver the same message to
9 them, right?

10 A Correct.

11 MR. DOVEL: Your Honor, I'm going to offer into
12 evidence now Exhibit 34, which we discussed in Mr. Gidley's
13 deposition. 34 was the complete POM manual. 34A was the
14 excerpt. We will offer the whole thing.

15 THE COURT: We already discussed that.

16 Any additional arguments?

17 MR. O'NEAL: No, Your Honor. But for completeness, I
18 would like to add as part of 34A, Chapter 7.

19 THE COURT: Any objection?

20 MR. DOVEL: Just to clarify, I have offered 34, which
21 includes the entire manual.

22 MR. O'NEAL: I thought we weren't doing that.

23 THE COURT: He just clarified he is offering the
24 entire 34.

25 MR. O'NEAL: Okay. Then we are good.

S. Gidley - Deposition Excerpts

1 THE COURT: 34 is received.

2 (The deposition excerpts continued to be read into
3 the record as follows:)

4 BY MR. DOVEL:

5 Q So we just talked about a POM user manual. When you use
6 that term, is the document labeled "using Progressive Outreach
7 Manager," is that what you were referring to?

8 A This appears to be part of the user manual.

9 Q I didn't give you the whole thing because I didn't want to
10 have you leafing through hundreds of pages to find exactly what
11 I want to talk about, but this is an excerpt of what you
12 consider the user manual?

13 A For the Avaya system, yes.

14 Q Okay. If you could turn to page 152, it's the beginning
15 of Chapter 15 titled "Contact List." So in the first section
16 there about contact lists, it says, "Contact lists are required
17 for running campaigns."

18 Do you see that?

19 A Yes.

20 Q Okay. So one of the -- when we looked at the campaign
21 tracker document earlier, one of the columns there is labeled
22 "contact lists." Is the term "contact list" used in a campaign
23 tracker the same term? Does that mean the same as "contact
24 list" does in this document?

25 A I don't know for sure, but that's a reasonable assumption.

S. Gidley - Deposition Excerpts

1 Q Okay. And do you know who would know for sure?

2 A Again, the Avaya engineer, anyone who had been trained in
3 Avaya or an Avaya representative.

4 Q All right. Let's mark as Exhibit 2 -- if you could turn
5 to page 3, third column, about a little over halfway down, do
6 you see an April 2nd, 2015, where it says "(248) 764-7521"?

7 All right. Do you know what this document is?

8 A It has no title. I can make an assumption.

9 Q What's your assumption?

10 A That these are the plaintiff's phone records for a period
11 of time from March 1st, 2015, until May 30th, 2015.

12 Q All right. And the first call, what's your understanding
13 as to what that column indicates?

14 A Whether the phone call was outgoing or incoming.

15 Q What's your understanding as to what the second column
16 represents?

17 A The date that the call was made or received.

18 Q So going back to page 3 about halfway down, there's a line
19 that indicates "incoming to April 2015," phone number
20 (248) 764-7521, right?

21 A Yes.

22 Q And that's a call placed to (503) 829-7628?

23 A Yes.

24 Q And then below that is the same, all the same information,
25 right?

S. Gidley - Deposition Excerpts

1 A Yes.

2 Q And then right below that there is an incoming call to
3 April of 2015 with the phone number (248)764-7514 to the same
4 phone number, (503)829-7628; is that right?

5 A Yes.

6 Q Do these first two calls appear to be calls placed by
7 ViSalus to (503)829-7628?

8 A It seems likely, yes.

9 Q When we listen to those messages and they identified
10 numbers ending in 7521 and 7522, you seemed pretty quick to
11 identify those as ViSalus extensions. How did you know those
12 were ViSalus extensions?

13 A Because our exchange is 764 and our extensions start with
14 7.

15 Q Is 7514 also a ViSalus phone number?

16 A It follows the same rules.

17 Q How many phone calls did ViSalus place to Lori Wakefield
18 in the spring of 2015?

19 A To Lori Wakefield?

20 Q Yes.

21 A I don't know how many to Lori Wakefield.

22 Q Okay. How many calls did Ms. Hollis place to the phone
23 number (503)829-7628?

24 A I believe it was five.

25 Q What's your basis for that belief?

S. Gidley - Deposition Excerpts

1 A It was provided by counsel -- you.

2 Q What did I provide you?

3 A The number five.

4 Q I told you there were five calls?

5 A Not personally.

6 Q All right. Who -- what number do you believe five calls
7 were placed to Lori Wakefield's phone number from and what was
8 the originating phone number? You just testified that, to your
9 knowledge, ViSalus placed five calls to Lori Wakefield in the
10 spring of 2015, right?

11 A Yes.

12 Q Okay. When did the first of those calls occur?

13 A I believe it was April 8th, 2015.

14 Q What were the circumstances surrounding that call?

15 A I have no idea.

16 Q Okay. What were the circumstances that resulted in that
17 call?

18 A It was a WinBack. It was an attempt to reengage a
19 promoter, a previous promoter on behalf of another promoter.

20 Q What do you know about topic one?

21 A I know that there were five phone calls placed to the
22 landline, which may or may not have been placed to the
23 plaintiff, Lori Wakefield; that the circumstances surrounding
24 that -- those calls -- were presumably for a WinBack campaign
25 to reengage promoters.

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1 Q Did you look at the WinBack spreadsheet that resulted in
2 the call to the landline in preparation for today's deposition?

3 A Inasmuch as to see that the landline was on that
4 spreadsheet, yes.

5 Q And you did see that the landline was on a spreadsheet,
6 right?

7 A Yes.

8 Q And although you don't know the file name right now, that
9 is information that you could obtain, right?

10 A Yes.

11 Q The way the WinBack campaigns are conducted, there is a
12 spreadsheet prepared with the phone numbers to be contacted; is
13 that right?

14 A Possibly.

15 Q Is there another way?

16 A I don't know.

17 Q You're aware of the way that I've just described, right,
18 that a WinBack campaign will be conducted based on a
19 spreadsheet that includes telephone numbers and names, right?

20 A It is. Microsoft Excel is a highly useful tool for that,
21 yes.

22 Q Okay. And that's one tool that is used -- is that these
23 spreadsheets are created and the individuals are contacted,
24 right?

25 A Yes.

S. Gidley - Deposition Excerpts

1 Q And those files are called WinBacks, right, the file name
2 includes the term "WinBack," right?

3 A If it was in regards to a WinBack campaign, yes.

4 Q Okay. Are you aware of any other way other than what we
5 have just described that ViSalus conducts WinBack campaigns?

6 A No. I'm just -- no.

7 Q So I understand -- let me start that again.

8 So I understand the supervisor would provide the
9 lists to the outbound agents. Who would compile the lists?

10 A I believe there was an algorithm created by our IT
11 department. That would have generated the list of eligible
12 customers and promoters.

13 Q So a computer program then runs through the list of all
14 the eligible promoters and pulls from that list of all the
15 eligible promoters or customers a select list, which are then
16 contacted; is that right?

17 A Yes.

18 Q And that same computer program, the same algorithm, would
19 run every time the call-back or WinBack campaign was placed?

20 A That particular algorithm? Yes, if it -- it wouldn't have
21 changed.

22 Q All right. Can you mark this as Exhibit 50, please. Have
23 you ever seen this report before?

24 MR. DOVEL: Your Honor, before I go on, let me offer
25 into evidence Exhibit 50.

S. Gidley - Deposition Excerpts

1 THE COURT: All right. One moment. This was from
2 the defendant in discovery, right?

3 MR. DOVEL: Yes, Your Honor.

4 THE COURT: Any further objections from defendant to
5 Exhibit 50?

6 MR. O'NEAL: Judge, I'm looking through the original
7 transcript, I'm wondering if this another one of those
8 examples.

9 THE COURT: Let me take a look. This appears to be
10 on page 36 of the Gidley transcript, line 12. I'll give you a
11 few moments.

12 MR. DOVEL: Your Honor, just for time, I would
13 suggest we just read the transcript. I don't need to offer the
14 exhibit at this point. We can look at it later and confirm
15 that it is the right one.

16 Would that work?

17 THE COURT: You may do that. I will reserve ruling
18 on Exhibit 50.

19 (The deposition excerpts continued to be read into
20 the record as follows:)

21 BY MR. DOVEL:

22 Q Have you seen this report before?

23 A Yes, briefly.

24 Q Do you know what it is?

25 A It looks like the process to upload phone numbers into the

S. Gidley - Deposition Excerpts

1 Progressive Outreach Manager in Avaya.

2 Q Were these the same instructions that would have been used
3 throughout, say, October 2014 through December 2015?

4 A The process would not have changed, so, yes.

5 Q When it says start with an Excel report of the information
6 you need relating to the contact you want to make, are those
7 Excel spreadsheets obtained from the reporting department?

8 A No. That would have been through our AQT, Automatic Query
9 Tool.

10 Q Are these reports taken from the Exigo system?

11 A Yes.

12 Q Once you make that spreadsheet with the contacts you want
13 to make, this gives instructions to upload those contact
14 spreadsheets into Avaya, right?

15 A The phone number specifically.

16 Q And then Avaya uses that to place outbound calls, right?

17 A Correct.

18 MR. DOVEL: Your Honor, I want to offer Exhibit 62,
19 which will be discussed next in Mr. Gidley's deposition.

20 THE COURT: All right. That appears to have been
21 marked in the Gidley deposition as 5.

22 So any objection to 62?

23 MR. O'NEAL: Are we on --

24 THE COURT: Pardon me?

25 MR. O'NEAL: What was the exhibit, Counsel?

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1 THE COURT: 62. Trial Exhibit 62, Depo. Exhibit 5.

2 MR. O'NEAL: Previous objection, Judge.

3 THE COURT: All right. I'll overrule that objection
4 and receive 62.

5 (The deposition excerpts continued to be read into
6 the record as follows:)

7 BY MR. DOVEL:

8 Q Have you ever seen this report before?

9 A Again, briefly.

10 Q What is it?

11 A The title is "Building a Contact List."

12 Q What was the purpose of this report?

13 A To build a contact list and import it. Actually not to
14 import it, because that was the previous one. This is how you
15 create a list of people.

16 Q All right. So this is how you build your contact list,
17 and the last exhibit was how you then import that contact list
18 into POM?

19 A Yes.

20 Q Would these instructions have been the same throughout the
21 period when ViSalus was using POM?

22 A As far as I know, yes.

23 Q Do you know who created this document?

24 A I do not.

25 MR. DOVEL: Your Honor, we now want to offer

S. Gidley - Deposition Excerpts

1 Exhibit 35, the ViSalus document titled "How To Start a
2 Campaign" with the correct contact list.

3 THE COURT: Anything further on Exhibit 35 than what
4 we have previously discussed?

5 MR. O'NEAL: Renew the objection, Judge.

6 THE COURT: Overruled. 35 is received in evidence.

7 (The deposition excerpts continued to be read into
8 the record as follows:)

9 BY MR. DOVEL:

10 Q But more likely than not, if a file is saved in that
11 folder, then it was used, and the people contacted, right?

12 A More than likely, yes.

13 MR. DOVEL: Your Honor, we want to offer into
14 evidence Exhibit 31, the POM campaign tracker. It is, again, a
15 ViSalus document. We've discussed it earlier. It is also
16 discussed in Gidley's declaration.

17 THE COURT: All right. Any further comments from
18 defendants?

19 MR. O'NEAL: Definitely renew the same objection,
20 Judge.

21 THE COURT: Overruled. And 31 is received in
22 evidence.

23 (The deposition excerpts continued to be read into
24 the record as follows:)

25

S. Gidley - Deposition Excerpts

1 BY MR. DOVEL:

2 Q Do you have the document in front of you?

3 A I do.

4 Q And you've taken a second to familiarize yourself with it?

5 A A second, yes.

6 Q Okay. Do you recognize the document?

7 A Yes.

8 Q Okay. And what do you recognize the document to be?

9 A It is titled "POM Campaign Tracker."

10 Q Okay. Is this a document ViSalus kept in the ordinary
11 course of business or was it created for this litigation?

12 A This was a document that was provided during the request
13 for production based on a particular request. This was one of
14 the documents that I was able to provide.

15 Q So I'm looking at -- this is from the campaign tracker
16 document, a contact list is labeled "Jason O'Toole_WinBack."

17 Do you know who Jason O'Toole is?

18 A Yes.

19 Q Who is Jason O'Toole?

20 A He is one of our promoters.

21 Q Why would his name appear in the title of the contact
22 list?

23 A Those were -- in that particular situation or that
24 particular list, those were his -- I'd have to break it down.
25 Jay O'Toole was a -- is a high-ranking ambassador. WinBack

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1 signified that that particular customer or promoter had not
2 ordered in 90 days. So those were his customers and promoters
3 who hadn't ordered in 90 days or longer.

4 Q Okay. So to the best of your understanding, what is a
5 completion code?

6 A The first line of page 85 states, "Completion code
7 identify the outcome of either making a phone call, sending
8 SMS, emails as part of the campaign."

9 Q What do you think when the user manual uses the phrase
10 "outcome of making a phone call," what is your understanding of
11 what that term means?

12 A The result of making the phone call.

13 Q To the best of your knowledge, did ViSalus use these
14 codes?

15 A Some of them.

16 Q So if we see in anything that you produced any of the
17 completion codes in the table, we should be able to assume that
18 they correspond to the description in this table?

19 A That seems logical, yes.

20 MR. DOVEL: This is a one-page document, and the
21 title in the lower left corner, "Excerpt from Q32013P2.CSV,
22 Exhibit 54 marked."

23 Your Honor, at this time we want to offer Exhibit 54
24 into evidence.

25 THE COURT: One moment.

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1 MR. DOVEL: It is an excerpt from one of the contact
2 lists that was discussed with Mr. Gidley.

3 THE COURT: One moment. It looks like it was marked
4 in the Gidley deposition as Exhibit 20. So anything further
5 from defendant on Exhibit 54?

6 MR. O'NEAL: Renew the objection.

7 THE COURT: All right. Overruled, and 54 is received
8 in evidence.

9 (The deposition excerpts continued to be read into
10 the record as follows:)

11 BY MR. DOVEL:

12 Q I'll represent this is an excerpt from one of the
13 documents that you all produced -- obviously -- there are more
14 than 8,500 lines on this file, so we did not want to give you
15 the whole thing. But does this look like the kind of
16 information that is kept in the reports that we were talking
17 about earlier, the reports of the results of campaigns?

18 A Yes.

19 Q Okay. Does it seem odd to you that the column that
20 appears to contain the information about the outcome of the
21 call would be titled "Reason"?

22 A No.

23 Q Why does that not seem odd to you?

24 A It's -- it just seems like it is the reason that
25 representative would have entered for the call disposition.

S. Gidley - Deposition Excerpts

1 Q Okay. Do you know who was responsible for choosing the
2 information that appeared in row 1?

3 A No.

4 Q Do you know who might be?

5 A No.

6 Q Do you know who might know who is responsible for that?

7 A No.

8 Q If we go -- do you know -- in column D you'll see there's
9 three rows near the bottom. They are labeled 79097, 80170, and
10 82148. In column D each of them has a reason, whatever that
11 is, that begins with "OB_"?

12 A Yes.

13 Q Okay. Are -- are those disposition codes that were
14 created by ViSalus?

15 A It is very likely.

16 Q Backing up, with regard to the (855)867-0322, earlier you
17 testified that more likely than not the calls placed from that
18 number would have been auto-dialed through POM, right?

19 A Yes.

20 MR. DOVEL: Your Honor, no more questions.

21 THE COURT: Are there any questions that the
22 defendant would like to read from the deposition of Scott
23 Gidley?

24 MR. O'NEAL: Yes, Your Honor.

25 THE COURT: You may proceed.

S. Gidley - Deposition Excerpts

1 CROSS-EXAMINATION

2 BY MR. O'NEAL:

3 Q Do you have any -- do you know why the system would be
4 detecting a live voice?

5 A Is that --

6 Q So that someone that picks up the phone call can be
7 transferred to an agent? Is that why live voice would need to
8 be detected?

9 A Yes.

10 Q Okay. So if a computer is dialing the numbers --

11 THE COURT: Mr. Dovel, you only gave me one page, and
12 it ended at 32, line 11.

13 MR. DOVEL: May I take a look at his script? I'm not
14 seeing a match of what I have.

15 MR. O'NEAL: May I proceed, Your Honor?

16 THE COURT: Yes.

17 (The deposition excerpts continued to be read into
18 the record as follows:)

19 BY MR. O'NEAL:

20 Q Okay. So if a computer is dialing the numbers, at what
21 point, if at all, does a live representative at ViSalus become
22 involved?

23 A But if a phone number -- if a phone call is made through
24 the Progressive Outreach Manager, the intention was in most of
25 these situations, or most of these phone numbers, that if a

S. Gidley - Deposition Excerpts

1 live person picked up the phone, that they would be connected
2 with an agent.

3 Q The list of phone numbers used for the original call
4 blasts, as that phrase is used here, would those lists be
5 called "call blast lists" or something else?

6 A It would have depended on what the nature of those phone
7 calls were. So again, it was primarily for declines, because
8 that was the main number, (877)ViSalus. Customers and
9 promoters would have recognized it, so primarily for declined
10 orders. So the lists would have been declines November 19th,
11 2015, or something -- something similar.

12 Q All right. Moving to the next phone number, that's
13 (248)764-7300?

14 A Yes.

15 Q The description there says "manually dialed by agent"?

16 A Yes.

17 Q What does that mean?

18 A These would have been manual phone calls coming from our
19 main number. The agents' extensions would have been hidden
20 essentially so that people were not calling the agents
21 directly. They would be calling the main number.

22 Q What would the extension show up as for the recipient of
23 one of those calls?

24 A It says right there.

25 Q Okay. And those are the only phone numbers that would

S. Gidley - Deposition Excerpts

1 have been manually dialed; all of the other phone numbers would
2 have come through POM, right?

3 A No.

4 Q What are the various purposes that the phone numbers were
5 used for?

6 A We would have done -- we have discussed the WinBack
7 campaign as one possible. We've discussed declined orders. We
8 had welcome calls to new promoters. We had a promotion for an
9 upgrade to a fuel kit, one of our offerings. We have had
10 end-of-month calls for promoters, beginning-of-month calls for
11 promotion. Since I'm looking at a list of numbers, off the top
12 of my head, I don't know what these numbers were assigned to.

13 Q Skip to page 112, line 10. Okay. So the 2442 number
14 might have been used for both auto-dialed and manually dialed
15 calls?

16 A Yes. I'm giving you an estimate.

17 Q What percentage of the calls placed from 2422 were
18 manually dialed versus auto?

19 A I can't answer that. That would be a guess, not an
20 estimate.

21 MR. O'NEAL: 38, line 13.

22 THE COURT: You need to read the question, right?

23 MR. O'NEAL: Yes.

24 (The deposition excerpts continued to be read into
25 the record as follows:)

S. Gidley - Deposition Excerpts

1 BY MR. O'NEAL:

2 Q So length of the order is one of the factors or length of
3 time since the last order?

4 A It is one of the factors because --

5 MR. O'NEAL: The question on page 87.

6 (The deposition excerpts continued to be read into
7 the record as follows:)

8 BY MR. O'NEAL:

9 Q To your knowledge, when did the outreach team start doing
10 WinBack campaigns?

11 A I believe it was sometime in 2013.

12 Q Okay. Are you aware of how WinBack campaigns were
13 conducted in 2013?

14 A Yes.

15 Q All right. And can you describe that process for me?

16 A The outbound agent was provided with a list of people who
17 were eligible for the WinBack campaign.

18 Q Go to page 126. Do you check the contact list against a
19 list of cell phone numbers to see whether or not you're calling
20 a landline or a cell phone?

21 A I do. There's no way to differentiate the type of phone
22 number that was provided to us upon enrollment.

23 Q Were there any changes in how the WinBack campaign were
24 conducted between 2013 and January 2016?

25 A Yes.

S. Gidley - Deposition Excerpts

1 Q What was the first change? When did it occur?

2 A I want to think that it was around October 2014 -- October
3 to December 2014, something like that.

4 Q Okay. How did the process change?

5 A Our Avaya engineer learned more about the Avaya system and
6 its functionality.

7 Q What do you mean by that?

8 A He read the manual.

9 Q What did he learn?

10 A There is a part of Avaya called Progressive Outreach
11 Manager, which you can use to place phone calls and report
12 numbers.

13 Q What do you mean "report numbers"?

14 A Well, it reports -- again, we were talking much earlier
15 today regarding the outbound agent reporting and who that
16 person may have reported to. The Avaya system took the place
17 of reporting the success of a campaign from an agent to --

18 Q These are the numbers --

19 MR. DOVEL: Your Honor, I think we are missing the
20 end of that answer.

21 MR. O'NEAL: What page is that?

22 THE COURT: That was on page 89; is that right? The
23 end of that answer is the words "system itself." So it will
24 read this way: "The Avaya system took the place of reporting
25 the success of a campaign from an agent to the system itself."

S. Gidley - Deposition Excerpts

1 Acceptable now?

2 MR. DOVEL: Yes, Your Honor.

3 MR. O'NEAL: Yes.

4 THE COURT: You may proceed.

5 (The deposition excerpts continued to be read into
6 the record as follows:)

7 BY MR. O'NEAL:

8 Q These are the numbers that were used to place outbound
9 calls on behalf of ViSalus?

10 A Yes, in that each number was a for a different purpose.

11 Q Okay. So ViSalus used POM for WinBack campaigns between
12 approximately October 2014 or December 2014 to October 2015?

13 A Again, off the top of my head, yes. However, we did
14 provide that information.

15 Q And the real heart of my question is what those various
16 spreadsheets would be named.

17 A I don't know how they would have been named through the
18 outbound team. It just comes back to I remember WinBack
19 campaign, you know. We do a lot of communication through
20 social media, through emails. I mean, there's just so many
21 forms of communication and getting that information out to
22 people that I cannot say with any certainty that, you know,
23 everything or anything other than a WinBack would have been
24 used -- the Progressive Outreach Manager would have been used
25 for that.

1 MR. O'NEAL: Thank you. That's all.

2 THE COURT: That completes the deposition testimony
3 of Scott Gidley; am I right?

4 MR. O'NEAL: Yes.

5 THE COURT: Does that complete all the deposition
6 testimony?

7 MR. DOVEL: It does, Your Honor.

8 THE COURT: All right. You may step down. Thank you
9 for your reading.

10 All right. We will take a 15-minute break.

11 (Open court; jury not present:)

12 THE COURT: Then the final witness is going to be
13 Mr. Davis?

14 MR. DOVEL: We are going to consult during the break,
15 but very likely, yes, Your Honor.

16 THE COURT: Then let me ask defense counsel, given
17 that I'm going to reserve any Rule 50 motions, do you want to
18 make them immediately after the close of defendant's case or
19 just make them before the case is submitted to the jury?

20 MR. FOSTER: Before the case is submitted to the
21 jury.

22 THE COURT: Good. I think that's most efficient.

23 All right.

24 (Recess.)

25 (Open court; jury not present:)

1 THE COURT: We are here without the jury. I
2 understand that the next witness will be Mr. Davis. Let me
3 explain to both sides what my thinking is regarding Exhibits 36
4 and 36A and B. I have already excluded 36C. I do want to hear
5 a foundation for 36 and 36A and B. So I assume that plaintiff
6 will attempt to lay a foundation of this under Rule 1006.
7 You're welcome to lay a foundation for any one of those three
8 or all of them, whatever you wish. 36C is not coming in. But
9 do whatever you want with 36, 36A, and 36B in terms of laying a
10 foundation. Then you can offer it.

11 I will then give the defendant -- I will ask the
12 defendant, unless you tell me now you don't want me to, do you
13 have any questions in aid of an objection to these exhibits?
14 If so, I'll let you ask your questions in aid of an objection.
15 I will then listen to any objection briefly and then make an
16 appropriate ruling. Then we will continue with the direct
17 examination.

18 All right.

19 MR. DOVEL: Yes, Your Honor.

20 THE COURT: Okay. Let's bring in the jury. Best
21 estimate for direct examination?

22 MR. DOVEL: Best estimate is 30 minutes; probably a
23 little shorter.

24 THE COURT: Is it Shawn, S-H-A-W-N?

25 MR. DOVEL: Yes, Your Honor.

1 (Open court; jury present:)

2 THE COURT: Welcome back, members of the jury. I do
3 want to tell you that my perception is we are making very good
4 time. I know sometimes it is hard for you to tell that, from
5 your perspective, but I do think we are making very good time.

6 Do you have a question?

7 JUROR: Can I run back and get my glasses?

8 THE COURT: Yes. You're welcome to go with Mary;
9 whatever you want. We will wait.

10 Please be seated. Relax.

11 JUROR: Actually I have a question. Will we actually
12 be able to see the depositions or just the exhibits?

13 THE COURT: Just the exhibits.

14 JUROR: Okay. That's what I thought.

15 THE COURT: And the reason why, we try to treat the
16 depositions as close as possible to a live witness being on the
17 stand. Obviously we can't see the demeanor of the witness who
18 testifies in deposition, but we don't want to give you the
19 transcript from some testimony but not others.

20 JUROR: Thank you.

21 THE COURT: All right. The plaintiff may call the
22 next witness.

23 MR. DOVEL: Your Honor, I am going to offer one more
24 exhibit, Exhibit 33, the ASR campaign tracker. I'm sorry.
25 Exhibit 32.

1 THE COURT: 32.

2 MR. DOVEL: This may be electronic only. It is a
3 ViSalus campaign tracker for the POM tracker, or the POM
4 system.

5 THE COURT: May I see it on my screen? How many
6 pages is that?

7 MR. FRANZINI: Give me one second.

8 THE COURT: Just on my screen.

9 MR. FRANZINI: Is that on your screen?

10 THE COURT: It says 36.

11 MR. FRANZINI: That's right. I'm trying to pull it
12 up. I need one second.

13 THE COURT: Sure. All right. Understood.

14 Anything further from the defendant on Exhibit 32?

15 MR. O'NEAL: Renew the objections, Judge.

16 THE COURT: Overruled. 32 is received.

17 MR. DOVEL: Your Honor, the plaintiff calls
18 Shawn Davis.

19 (The witness was duly sworn.)

20 THE CLERK: Thank you. Please be seated. Would you
21 please state your name for the record, spelling your last.

22 THE WITNESS: My name is Shawn Davis. D-A-V-I-S.
23
24
25

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1 DIRECT EXAMINATION

2 BY MR. DOVEL:

3 Q Mr. Davis, can you give us a brief, one-sentence summary
4 of what you are here to talk about today.

5 A Yes. I'm here to talk about my analysis and summaries of
6 all the outcome codes within defendant's contact lists.

7 THE COURT: Let me see counsel at the side bench for
8 a moment.

9 (A discussion was held off the record at sidebar.)

10 (Open court; proceedings resumed:)

11 THE COURT: I'm going to clarify what I just heard
12 and also what I just said.

13 Mr. Davis, you are welcome to give us your summaries,
14 but for reasons I've discussed with counsel, not an analysis,
15 please. Just the summary.

16 THE WITNESS: Okay. Understood.

17 BY MR. DOVEL:

18 Q Where is it you live today?

19 A I live in the western suburbs of Chicago.

20 Q Tell us just briefly about your family.

21 A I have been married for almost ten years to my wife,
22 Melissa, who is a school psychologist in a high school, and we
23 have a four-year-old daughter, Allie.

24 Q Where do you work?

25 A I work for Edelson, PC.

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1 Q What is Edelson, PC?

2 A Edelson, PC is a plaintiffs law firm in the Chicago area.

3 Q What's the relationship of Edelson, PC to this lawsuit?

4 A Edelson, PC is one of the law firms that's representing
5 the plaintiff.

6 Q What is your job at Edelson?

7 A My job is director of digital forensics.

8 Q Can you tell the jury what you mean by the director of
9 digital forensics; just the sorts of things you do.

10 A Sure. Essentially I lead a technical team in performing
11 investigations that relate to data breaches, invasions of
12 privacy, or security issues. We also analyze large datasets
13 involving TCPA cases.

14 Q Can you summarize for the jury your education, training,
15 and experience that led you to the position where you are at
16 now?

17 A Yes. I have a master's degree from the Illinois Institute
18 of Technology in computer and network security. I have
19 experience working for Motorola Solutions where I worked in the
20 security operations center and helped protect various
21 government agencies and military bases. I did a little bit of
22 side work for the FBI. I've been at Edelson performing this
23 sort of investigations and cases for about five and a half
24 years.

25 Q In the course of your work have you testified in front of

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1 or consulted with government agencies, prosecutors, and that
2 sort of thing?

3 A Yes.

4 Q Would you briefly describe that for us.

5 A Sure. I have testified as a subject matter expert in
6 front of the Illinois Senate and House of Representatives. I
7 have also advised a United States senator on various issues.
8 Recently I was here in Portland. I gave a presentation for a
9 privacy seminar for the Oregon Attorney General.

10 Q Do you do any teaching in your field?

11 A Yes.

12 Q Describe that for us, please.

13 A I'm an adjunct professor at the Illinois Institute of
14 Technology. I have been teaching courses on open source
15 operating systems and cyber security for about the past five
16 years.

17 Q Describe for us what it is you were asked to summarize.

18 A I was asked to summarize 406 contact lists, basically the
19 outcome codes within those and total them up.

20 Q All right. Mr. Davis, I have handed you Exhibit 38-115.
21 Is this one of the contact lists that was included in the
22 information that you summarized?

23 A It is.

24 Q This one is entitled "Jason O'Toole WinBack"; is that
25 correct?

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1 A That's correct.

2 MR. DOVEL: Your Honor, we have talked about how
3 voluminous these materials are. I would like now to hand the
4 jury just one of these so they can get a sense of what one
5 contact list is in terms of its quantity.

6 THE COURT: Are you handing them Exhibit 38-115?

7 MR. DOVEL: Yes. I have a copy for each of the
8 jurors. We are going to go through just a couple of the pages.

9 THE COURT: All right. I'm not going to let the
10 jurors hold on to them afterwards, but for purposes of this
11 testimony, you may.

12 And it is 38-115?

13 MR. DOVEL: Correct.

14 MR. O'NEAL: Could we have a copy?

15 THE COURT: Make sure you have a copy for defense
16 counsel.

17 Mr. Adams, do you have a copy for the Court too? If
18 you have an extra for my law clerk, that's great. If not, we
19 will share.

20 Does every juror have a copy?

21 MR. DOVEL: We have got two that are willing to
22 share. Is that okay with Your Honor?

23 THE COURT: Sure. That's fine. So I'll do without.

24 MR. DOVEL: Thank you, Your Honor.

25 THE COURT: Next time bring enough for everybody.

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1 MR. DOVEL: We thought we did, but we didn't. I
2 apologize, Your Honor.

3 BY MR. DOVEL:

4 Q Let's turn to the -- open it up to the first page here.
5 Mr. Davis, can you describe generally the columns of
6 information that appear on this first page?

7 A Yes. The first column is ID, which appears to be the
8 identification number of the person that's in the contact list.
9 We have "First Name," which is the person's first name. We
10 have the "Last Name" column, which indicates the person's last
11 name. The customer type; the type of customer. We have the
12 country code for the phone number. Then we have the phone
13 number itself. Then we have "AS Day," which contains dates.

14 Q How would you tell how many separate contacts are
15 indicated in this particular document?

16 A Within this document I would essentially use computer
17 software that would add up all of the rows.

18 Q If we look at the back of this document, can we tell how
19 many different rows there are?

20 A Yes. It appears to indicate that there are 61,636 rows.

21 Q And that's found on page 1045?

22 A That's correct.

23 Q Now, in this particular contact list, does this contact
24 list include outcomes that tells us the outcome of these calls?

25 MR. FOSTER: Objection, Your Honor.

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1 THE COURT: Sustained. You may rephrase.

2 BY MR. DOVEL:

3 Q Does this contact list contain a column that identifies
4 outcomes?

5 A It does not appear to.

6 Q I would like you to turn to page 698. If you'd look on
7 page 698, about two-thirds of the way down, you'll see row
8 41156.

9 Do you see that?

10 A Yes.

11 Q And what name appears in that row?

12 A That name is Lori Wakefield.

13 Q And if you look across, does it have a phone number
14 associated with Lori Wakefield?

15 A Yes.

16 Q And what's the phone number?

17 A The phone number is (503)829-7628.

18 Q And when it says then all the way across "AS Date," what
19 is your understanding about what "AS Date" means?

20 MR. FOSTER: Objection. Foundation.

21 THE COURT: Sustained.

22 BY MR. DOVEL:

23 Q Do you have an understanding of what "AS Date" means?

24 THE COURT: That's a yes-or-no question.

25 THE WITNESS: I do not.

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1 MR. DOVEL: That's easy enough, Your Honor. We are
2 going to set aside 38-115 for now.

3 THE COURT: Should we collect them back from the jury
4 or are you going to use them later?

5 MR. FOSTER: Your Honor, I would like to have the
6 jury hold on to those.

7 THE COURT: Fine. Thank you.

8 BY MR. DOVEL:

9 Q Now, when you did your summaries, how did you identify --
10 withdrawn.

11 When you were looking at spreadsheets from ViSalus,
12 how many total spreadsheets were you provided, or contact
13 lists?

14 A 405.

15 Q But how many in total before you wound up with 405?

16 A Approximately 2,000.

17 Q Out of the 2,000, how did you identify which ones you
18 would include in your summary?

19 A Based off of information from Defendant ViSalus.

20 Q What information from ViSalus did you look at?

21 A I looked at Mr. Gidley's declaration, one of the exhibits.

22 Q All right. Let's put up on the screen Mr. Gidley's
23 declaration, which is Exhibit 37?

24 THE COURT: Not 32? My mistake; you're right.

25 MR. DOVEL: I believe it is 37.

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1 THE COURT: All right.

2 BY MR. DOVEL:

3 Q Let's take a look at the first paragraph. Here it says,
4 "I, Scott Gidley, make this declaration on behalf of ViSalus,
5 the defendant in the action Wakefield v. ViSalus, pending in
6 the U.S. District Court," and so on.

7 Do you see that?

8 A Yes.

9 Q Now, let's start with, how did using this declaration
10 identify for you what spreadsheets or contact lists you should
11 be summarizing?

12 A The exhibit contained the file names of the spreadsheets.

13 Q Let's pull up the first page of that list. Take a quick
14 look at that. Is this the list that you were talking about?

15 A Yes.

16 Q Approximately how many pages long is this list?

17 A One or two or three.

18 Q Let's go to the end and take a look.

19 THE COURT: 12?

20 THE WITNESS: Or seven or twelve.

21 BY MR. DOVEL:

22 Q It goes all the way through Exhibit 37-12; is that right?

23 A That's right.

24 Q Now, when you looked at these contact lists, did you find
25 out one way or the other whether some of them had outcome codes

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1 and others did not?

2 A Ultimately, yes.

3 Q Did you find that all of the calls that were identified in
4 these contact lists had outcome codes?

5 A Could you repeat that?

6 Q When you looked at the rows indicating a contact or call
7 to be made, did it indicate in each case whether there was an
8 outcome code associated with that?

9 A Not every time.

10 MR. FOSTER: Your Honor, may I approach?

11 THE COURT: What's your objection?

12 MR. FOSTER: Objection to characterizing these are
13 calls or contacts. I don't think there is anything in the
14 record.

15 THE COURT: I'm going to sustain the objection. You
16 can basically ask what were the labels on the columns.

17 MR. DOVEL: All right.

18 BY MR. DOVEL:

19 Q When you used Mr. Gidley's declaration, did it indicate
20 whether or not these contact codes had actually been used with
21 POM?

22 A Rephrase the question, please.

23 Q Yes.

24 When you looked at Mr. Gidley's declaration, did he,
25 in his declaration, indicate whether these contact lists were

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1 contacts that had been used with the POM machine?

2 A He did.

3 Q And what did he indicate?

4 THE COURT: Which paragraph are you referring to now?
5 Paragraph 5. You're welcome to highlight that.

6 BY MR. DOVEL:

7 Q Let's look at paragraph 5. It says, "To the best of my
8 knowledge, all of the marketing campaigns that ViSalus ran
9 calling U.S. residents using POM are identified by the
10 spreadsheet name on the POM campaign tracker spreadsheet or are
11 located in the ASR projects folder, and the spreadsheet name
12 includes call blast results or blast results. All of these
13 spreadsheets are listed in the attached Exhibit A hereto."

14 Is that what you found in Mr. Gidley's declaration?

15 A That's correct.

16 Q Does he indicate that these were campaigns that ViSalus
17 ran using POM?

18 A He did.

19 Q Now, what information were you summarizing from these
20 spreadsheets?

21 A I was summarizing the number of outcome calls -- number of
22 outcome codes -- excuse me -- and the number of calls.

23 Q What is an outcome code?

24 A So the outcome code is created by the POM machine that has
25 the disposition of the call.

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1 Q When you say "disposition of the call," what do you mean?

2 A What ultimately ended up happening at the end of the call.

3 MR. FOSTER: Objection. Foundation.

4 THE COURT: What's the foundation of that knowledge?

5 Is that something from Mr. Gidley's declaration?

6 THE WITNESS: That was from reviewing the POM manual
7 and some of the discovery production.

8 THE COURT: Then the objection is sustained.

9 BY MR. DOVEL:

10 Q Mr. Davis, did Mr. Gidley, in his declaration, provide any
11 information about outcome codes that you used in your summary?

12 A Yes.

13 Q Describe to the jury what information he provided in his
14 declaration about outcome codes.

15 THE COURT: Before you do that, could you call our
16 attention to where in the declaration you are referring so we
17 can all follow along?

18 MR. DOVEL: Yes, Your Honor. It starts with
19 paragraph No. 6 and then we will go to 7.

20 THE COURT: Very good.

21 BY MR. DOVEL:

22 Q Paragraph No. 6 says, "To the best of my knowledge,
23 ViSalus did not alter the meaning of the POM disposition codes
24 (also called completion codes) from the definitions set forth
25 on pages 85 through 89 of the using Proactive Outreach manager

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1 manual that was Exhibit 19 to my deposition on December 12th,
2 2017."

3 Let's look at the next paragraph. This paragraph
4 says, "To the best of my knowledge, the following disposition
5 codes indicate no voice mail could have played."

6 Do you see that, sir?

7 A Yes.

8 Q And then there is a list. Do you understand that each of
9 those is a completion code or disposition code?

10 A I do.

11 Q The list carries over onto the next page?

12 A Yes.

13 Q Let's talk about a couple of those. What is your
14 understanding of what is meant by the disposition code
15 "call busy"?

16 MR. FOSTER: Objection. Foundation.

17 THE COURT: Sustained.

18 BY MR. DOVEL:

19 Q Now, sir, in doing your analysis, how did you summarize --
20 withdrawn.

21 In your analysis did you summarize how often each of
22 these disposition codes appeared in the approximately 400
23 spreadsheets that were identified by Mr. Gidley as relevant to
24 this lawsuit?

25 A I did.

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1 Q Can you describe for us generally how you did that. Let
2 me back up. Did you do that by yourself just looking at each
3 one manually and going through it one at a time and look?

4 A I did not.

5 Q How many total calls was it that you found approximately
6 were in that collection of about 400 contact lists?

7 A Approximately 4.1 million calls.

8 Q Would it have been practical for you to go through each
9 one and manually add them up?

10 A Definitely not.

11 Q Instead of doing that, describe for the jury the process
12 that you used in order to add them up.

13 A Yes. I essentially used a database, which kind of worked
14 like a digital adding machine. So I imported all of the
15 contact lists into the database and then used that to add up
16 all of the completion codes for each type of completion code.

17 Q I want you to look at Exhibit 36, which is not in evidence
18 yet. Do you have a copy of that in front of you?

19 A Yes.

20 Q I don't want you to read out any numbers right now, but
21 did you make a determination as to the number of calls where
22 they had the disposition code of "answer machine"?

23 A Yes.

24 Q Did you make an analysis of various other disposition
25 codes?

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1 A I did.

2 Q Did you sum up the number of calls where no outcome is
3 listed?

4 A I did.

5 Q Did you identify the total number of calls where no
6 artificial or prerecorded voice could have played according to
7 Mr. Gidley?

8 MR. FOSTER: Objection. Foundation.

9 THE COURT: Overruled.

10 THE WITNESS: Yes.

11 BY MR. DOVEL:

12 Q Now, after you -- did you prepare the summary that's
13 marked as Exhibit 36 based on your analysis?

14 A Yes.

15 Q Now, after you did that summary, did you prepare a second
16 summary, which has been marked as Exhibit 36A for
17 identification?

18 A I did.

19 Q Can you briefly describe for us how 36A differs from 36;
20 that is, what you did to prepare 36A?

21 A Sure. So to start with, 36, I essentially took the 405
22 contact lists. I put them in the database. We had a class
23 list of all the class members that were involved, and the class
24 list contained either phone number 1 or phone number 2, and I
25 basically matched the phone number in the 405 spreadsheets, all

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1 of those phone numbers, against the numbers that appeared in
2 the KCC class list. Then -- should I go on?

3 Q Yes.

4 A So the next summary that I created, which was 36A, is
5 basically the same, but the difference is instead of matching
6 to phone number 1 and phone number 2, I only matched to phone
7 number 1, and then I also removed any businesses that appeared
8 in the first name or last name columns of the spreadsheets.

9 Q Why is it that when you prepared the second summary, you
10 matched just the phone number 1 and not the two phone numbers?

11 A So when I reviewed the manual for POM, the manual had
12 mentioned that it could either dial based off of phone number 1
13 or phone number 2.

14 MR. FOSTER: Objection. Foundation.

15 THE COURT: Overruled.

16 THE WITNESS: So it had mentioned that it could
17 either dial phone number 1 or phone number 2. But I had
18 realized that in looking at the discovery production, I didn't
19 find anything that indicated that was for certain, and so to
20 try to be a little bit more conservative, in this next summary
21 I limited it just to phone number 1, just because I know at
22 least one phone number was called, and that would be the first
23 one. I did not know for certain that the second phone number
24 was called.

25 THE COURT: When you say "the second summary," is

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1 that what you are referring to as 36A?

2 THE WITNESS: That's correct.

3 BY MR. DOVEL:

4 Q Approximately how many phone calls were removed from your
5 summary when you got rid of the second phone number?

6 A Removing the second phone number and the businesses were
7 about -- around 11,000 or so. Businesses would have been
8 around 6,000. The second phone number, I believe, was less
9 than 5,000 that were removed.

10 Q You say you removed businesses. How did you identify
11 phone numbers that were associated with a business using the
12 ViSalus contact sheets?

13 A Yes. So I essentially looked at the "First Name" and
14 "Last Name" column. That's where the business names, if they
15 were, would appear. I did a systematic search of looking for
16 business identifiers, such as LLC, Inc., Incorporated,
17 Corporation, and so I went through all of those. Then I marked
18 any that I found, and I removed them.

19 Then to be even more assured, I did a filter where I
20 filtered the last name column to show me any name that was
21 greater than 15 characters, because a lot of times businesses
22 do have longer names. Then I manually found other businesses
23 to remove.

24 Q Approximately how many numbers did you -- how many calls
25 did you remove from your summary when you took out the calls

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1 associated with a business?

2 A Around 6,000 or so.

3 Q Now, when you did that -- all right. Now, did you prepare
4 another revised version of the summary, which has been marked
5 for identification as 36B?

6 A Yes.

7 Q Let me back up. On 36A, did you do anything to divide the
8 campaigns into different types and do an analysis based on the
9 type of campaign?

10 A I did.

11 Q Describe that for the jury.

12 A So I essentially divided the 406 spreadsheets into two
13 buckets. One bucket were all of the contact lists used in the
14 WinBack campaign; then the other bucket were spreadsheets that
15 were not used in the WinBack campaign.

16 Q Of the 400 approximately contact lists or spreadsheets
17 that you were analyzing, approximately how many of them were
18 WinBack compared to others?

19 MR. FOSTER: Objection. Foundation.

20 THE COURT: Sustained. If the exhibits come in, you
21 can point that out.

22 BY MR. DOVEL:

23 Q Let's go to 36B, the second version -- second revision.
24 Describe for us what you did in 36B that varied from what you
25 had done before.

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1 A Sure. So for 36B, I did not match against the KCC class
2 list; instead I looked at all 406 spreadsheets. Then I removed
3 the businesses with the same manner that I described before,
4 but another thing I did was I removed any phone numbers that
5 were outside of the United States or that were invalid.

6 Q How do you know whether a phone number is invalid or not?
7 What do you mean by "invalid"?

8 A Yes. So a phone number will essentially have an area
9 code, the first three numbers, and then it will have a prefix,
10 the next three numbers. So you can essentially determine if a
11 phone number is valid based off if the area code is a known
12 United States area code and within that area code if the prefix
13 is a known prefix within that area code.

14 Q Is that something that you're able to look up in
15 directories of tables, areas codes in the U.S. and prefixes and
16 so on?

17 A Yes. It is listed in a lot of different sources.

18 Q Did you manually do that analysis by looking it up in a
19 table, or did you do something else?

20 A I did something else.

21 Q Can you describe that for the jury.

22 A Yes. So Google created a tool, which you can essentially
23 input in phone numbers, and then the Google tool already knows
24 the valid area codes and the valid prefixes. If you put in a
25 number that is invalid, it looks at the area code and prefix,

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1 and then it will return a result that says it is invalid.

2 Q Did you do anything to make certain that this Google
3 tool -- the results it produced -- were reliable?

4 A Yes.

5 Q What did you do?

6 A I did spot checks with other tools that you could
7 essentially input numbers, and I checked to see if it was
8 consistent within either a U.S. number or an invalid number or
9 other country.

10 Q Was this work on this case the first time you'd used this
11 Google tool, or do you have experience with it?

12 A I have used the Google tool before.

13 Q In other cases?

14 A Yes.

15 MR. DOVEL: Your Honor, we offer Exhibits 36A, 36,
16 and 36B.

17 THE COURT: Before I turn to defendant, am I correct
18 you did not use the Google tool for either 36 or 36A; is that
19 correct.

20 THE WITNESS: That is correct.

21 THE COURT: Let me ask defense counsel, is my
22 assumption correct that you have access to the KCC class list?

23 MR. FOSTER: I do, Your Honor.

24 THE COURT: Then I will ask you, any objections to
25 36, 36A, or 36B? If you wish to ask some questions in support

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1 of a potential objection first, you may do that.

2 MR. FOSTER: I would like to do some cross-exam,
3 Your Honor.

4 THE COURT: You may ask questions in aid of an
5 objection.

6 BY MR. FOSTER:

7 Q Good afternoon, Mr. Davis.

8 A Good afternoon.

9 Q I would like to start with something. I would like to
10 clarify a certain point. You mentioned over and over that
11 Exhibits 36, 36A, and 36B are summaries of the 405 spreadsheets
12 identified in Mr. Gidley's affidavit; is that correct?

13 A Yes.

14 Q But that's not exactly true, is it? It is not true, is
15 it?

16 A You would have to rephrase.

17 Q Okay. So you took the 405 exhibits -- the 405
18 spreadsheets and added them all together. Those spreadsheets
19 included names, telephone numbers, and disposition codes,
20 correct?

21 A That's correct.

22 Q Does your summary reflect the totals of those disposition
23 codes?

24 A It does, but what I had just explained the differences
25 between each version, obviously there will be some changes.

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1 Q Let's start with 36. You did not total up the disposition
2 codes of the 405 spreadsheets. In fact, you culled some of
3 that information out, didn't you?

4 A I culled -- say again, please.

5 THE COURT: Let me ask him this question: When you
6 took out the names from the KCC class list and told me that was
7 for 36A, did you apply that also to 36?

8 THE WITNESS: 36 and 36A were both run against the
9 KCC class list.

10 THE COURT: Understood. Thank you. I'm sorry.

11 You may continue.

12 BY MR. FOSTER:

13 Q So I'm correct in assuming that there are more lines of
14 information in the combined 405 spreadsheets than there are in
15 the dataset after you culled out the information using the KCC
16 class list; is that right?

17 A That's correct.

18 Q Okay. You didn't create the KCC class list, did you?

19 A KCC was a neutral party that created that list.

20 Q Do you work for KCC?

21 A I do not.

22 Q You work for Edelson, correct?

23 A That's correct.

24 Q Counsel for the plaintiff; is that right?

25 A Yes.

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1 Q And you don't have any idea what data went into the KCC
2 list, do you?

3 A I know it was originally from the 405 spreadsheets.

4 Q Did you create it?

5 A Did I create what?

6 Q The KCC class list.

7 A I created a version, but I did not ultimately create the
8 final KCC class list.

9 Q You didn't build the KCC class list, did you?

10 A Can you define "build"?

11 Q Put together. Input the information. The same way you
12 built this summary. You didn't create the KCC class list, did
13 you?

14 A I created a class list that ultimately was sent to KCC,
15 and they did further processing on it.

16 Q But you didn't do that further processing; am I correct?

17 A That's correct.

18 Q But you used this class list that you didn't create, that
19 you didn't put the data into, to scrub those 405 spreadsheets,
20 which you've summarized as Exhibit 36; isn't that correct?

21 A Say again.

22 THE COURT: It is not clear to me what "scrub" means.
23 I would like to really have a better understanding of what you
24 did between the 405 contact lists and this KCC class list.
25 What did you do? Did you make sure that it was only the

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1 numbers that were on the KCC class list? Did you take out the
2 numbers on the KCC class list? What did you do with the KCC
3 class list to create 36 and 36A?

4 THE WITNESS: So I had originally taken all 405
5 spreadsheets, and then I basically combined them all, and then
6 I put that into a database. So then the KCC class list has a
7 phone number 1 and a phone number 2 column. So for 36, what I
8 did was I basically took all of that data about the 405
9 spreadsheets, and then in creating 36, every time either phone
10 number 1 or phone number 2 matched all of the data I had
11 against phone number 1, phone number 2 and the KCC class list,
12 then that row was outputted into the results that ultimately
13 ended up being the summary.

14 THE COURT: For 36A, it was only phone if number 1 in
15 the KCC class list that appeared on your master conglomeration
16 of the 405 contact lists, then would you take it out and put it
17 into your totals, right?

18 THE WITNESS: Right.

19 THE COURT: You may proceed.

20 BY MR. FOSTER:

21 Q That's the total of your summary. You are not summarizing
22 the 405 spreadsheets. You are summarizing the 405 spreadsheets
23 after you ran the analysis for the KCC class list?

24 A That's correct.

25 THE COURT: Instead of "analysis," would it be fair

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1 to say "after running the filter"? Would that be an
2 appropriate way to look at it? Basically there is a lot of
3 information on the 405 contact lists. For Exhibit 36, you
4 would only put on that summary if they satisfied the filter on
5 the KCC class list for either phone number one or phone number
6 two. And for 36A, you would only put it on your summary if it
7 satisfied the KCC class list for the filter for phone number
8 one? Do I have that right?

9 THE WITNESS: Yes.

10 BY MR. FOSTER:

11 Q Let's talk about an additional analysis you ran for 48A.

12 A 48A?

13 Q Excuse me. 36A.

14 A Okay.

15 Q You purported to pull out those numbers associated with
16 businesses; is that correct?

17 A That is correct.

18 Q There is nothing in the original 405 spreadsheet that you
19 can sort that says, "This entry is a business," can you?

20 A No.

21 Q So you had to run a subjective analysis of what you
22 considered to be a business; isn't that correct?

23 A That is correct.

24 Q And when you -- when did you turn over Exhibit 36A to our
25 firm?

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1 A 36A, I'm not sure when you received it, but I believe I
2 completed it on April 6th.

3 Q So that would have been Saturday, April 6th; is that
4 right?

5 A That sounds right.

6 MR. FOSTER: I received it, for the record --

7 THE COURT: No, you're not testifying. If you want
8 to call yourself as a witness, that will open up another can of
9 worms.

10 MR. FOSTER: Very well, Your Honor.

11 BY MR. FOSTER:

12 Q Are you aware if you provided any kind of key to explain
13 to my firm how you determined whether a name was a business?
14 Did you provide that?

15 A I have no knowledge what your firm received.

16 Q Did you put together any such key?

17 A I had put together what I had considered businesses, and I
18 sent it to counsel, plaintiff's counsel.

19 Q And when you say you put together what you considered to
20 be businesses, did you create some sort of Excel spreadsheet
21 showing all of the businesses you've identified, or how did you
22 put that together?

23 A Kind of how I explained it to the jury. All the business
24 identifiers that I first searched for, I put those in the
25 email, and then I described the process about how I had looked

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1 for names -- or the phone -- excuse me -- the "Last Name"
2 column that was greater than 15 characters. So I explained all
3 of that in the email.

4 Q So you explained to plaintiff's counsel?

5 A That's correct.

6 Q And so I want to take a step back. When you take those
7 405 spreadsheets and put them in one database, and then you
8 pull out only that information related to the KCC class list,
9 whether it be column 1, column 2, or just column 1, you create
10 a secondary database; is that correct?

11 A That's not correct.

12 Q What do you create?

13 A So essentially the database ends up staying the same. I'm
14 just using different queries to get different data.

15 Q But, for instance, you guys provided to our firm five
16 separate spreadsheets labeled "all calls from KCC numbers
17 0000"?

18 A Correct.

19 Q 0001, 0002, 0003, and 0004?

20 A Correct.

21 Q Are you aware what those Excel spreadsheets showed?

22 A Yes.

23 Q Are those spreadsheets the actual results of your analysis
24 of running the KCC class list against the 405 original POM
25 spreadsheets?

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1 A That's correct.

2 Q Okay. So in that database you've already removed all of
3 the numbers that you deemed not to match the KCC list; is that
4 right?

5 A Say again, please.

6 Q You removed from the Excel spreadsheets labeled "all calls
7 from KCC numbers," you have already removed the numbers that
8 aren't associated with the KCC class list, right?

9 A Yeah, I removed them from the sheets you received, but I
10 did not remove them from the database.

11 Q Correct. So the sheets we received only showed the calls
12 that you had selected as matching the KCC list, right?

13 A That is correct.

14 Q Okay.

15 THE COURT: One second. We have a question from the
16 jury or a comment.

17 JUROR: I'm unclear what the KCC class list is.

18 THE COURT: All right. Let me ask, Mr. Davis, what
19 is your understanding of what is the KCC class list?

20 THE WITNESS: My understanding of the KCC class list,
21 based off of plaintiff's counsel and defense counsel, they had
22 gotten together to basically establish what the class list was
23 going to be. So in all of these summaries, I have been talking
24 about the number of calls. The class list is talking about the
25 number of people that are involved. So you would take unique

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1 phone numbers. So the class list was essentially a list of all
2 of the people that were involved as opposed to how many calls
3 they had received and all that.

4 THE COURT: I'll remind the jury that in my
5 preliminary instructions, and I will repeat this again in the
6 final instructions, I gave you a class definition. So there
7 was a definition of the quality and people in the class. Now
8 we have a list of the people that appear to satisfy that
9 definition.

10 You may proceed.

11 MR. FOSTER: Thank you.

12 BY MR. FOSTER:

13 Q So turning to Exhibit 36A, Mr. Davis, I assume there were
14 similar spreadsheets/databases after you ran your analysis
15 similar to those labeled "all calls from KCC numbers,"
16 something to that -- strike that.

17 After you ran your analysis, where you took the 405
18 spreadsheets and took the KCC list and queried those, you ended
19 up with a final database of names, disposition codes, and
20 numbers, right?

21 A Not a final database; a final output sheet.

22 Q Would that be an Excel spreadsheet?

23 A I believe it was a CSB --

24 Q Okay. So a CSB file.

25 A -- which is like an Excel spreadsheet.

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1 Q So that CSB file would contain all the names, numbers, and
2 disposition codes that you are summarizing in 36A, right?

3 A That's correct.

4 Q If I don't have that CSB database, is there any way for me
5 to tell what names and numbers from the 405 spreadsheets that
6 you actually included in your summary?

7 A Say again, please.

8 Q If I don't have the CSB file that was outputted from your
9 system that you used to create the summary labeled 36A, if I
10 don't have that, how am I supposed to know what names, what
11 numbers, and which disposition codes from the 405 spreadsheets
12 you included in Exhibit 36A?

13 A Well, you would essentially have the 405 contact lists.
14 So you could have potentially done your own analysis on those,
15 I suppose.

16 Q But you agreed with me earlier that the 405 spreadsheets
17 had more names, numbers, and disposition codes than your CSB
18 file that you used to summarize in 36A, right?

19 A That is correct.

20 Q And 36A doesn't have any indication which names, which
21 numbers, or which disposition codes you're summarizing there?

22 A That is correct.

23 Q So how am I supposed to take the 405 spreadsheets, without
24 the benefit of seeing either your underlying data or having you
25 sit with me and explain the analysis, how am I supposed to

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1 know? How am I supposed to check? How am I supposed to verify
2 the work in 36A?

3 A I'm not sure what information you received about 36A.

4 THE COURT: He got a copy of 36A, the chart.

5 THE WITNESS: No. I mean about the analysis that I
6 performed.

7 THE COURT: By the way, this CSB file you are talking
8 about, is that basically just the compilation of the 405
9 contact lists, filtered out -- basically with a filter applied
10 for the KCC class list and then the additional stuff that you
11 did about business names?

12 THE WITNESS: That's correct.

13 THE COURT: Okay.

14 BY MR. FOSTER:

15 Q Again, with the business names, that's an objective
16 criteria. Let's take a step back.

17 In 36A, there is nothing to explain to me what you
18 meant by "business names." I think it says, "Calls associated
19 with businesses"; is that correct?

20 A In the summary exhibit, that's correct. Again, I don't
21 know what you received.

22 Q Let's just assume all I got was the summary. All I had
23 was 36A. And all I have are the 405 POM campaign sheets.
24 Assume I have three days. How could I run an analysis that
25 verifies the 6,700 business names that you claim to have found

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1 in 36A?

2 A Well, I suppose if I were you, I would do the same thing
3 that I initially thought of. I looked at the contact lists,
4 and I determined where would I find out if it was a business.
5 As you mentioned before, there is not a column that identifies
6 a business, unfortunately. That would have been much easier.
7 So I noticed that businesses were located in the first and last
8 name column. So I suppose if I were you, I would have looked
9 through the spreadsheets and then determined myself where I
10 found business names.

11 Q But if I don't know the numbers that you actually pulled
12 out, how can I verify whether you included a business or not,
13 or you included a name as a business name?

14 A If you would have done the analysis, you could have looked
15 at your total of businesses versus my total and seen that they
16 were the same or they were not.

17 Q You didn't run this analysis of businesses until Saturday,
18 did you?

19 A That's correct.

20 Q And you didn't run your analysis -- you didn't do an
21 analysis of businesses in Exhibit 36, did you?

22 A I did not.

23 Q Who told you to run the analysis of businesses? Was that
24 something you came up with on your own?

25 A No.

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1 Q It was something your attorneys told you to do, right?

2 The attorneys at Edelson?

3 A Plaintiff's counsel told me, yes.

4 Q You ran that analysis because we pointed out that we
5 thought that there may be errors in Exhibit 36; isn't that
6 correct?

7 A I don't think that's correct.

8 Q You don't think there are errors in Exhibit 36?

9 A I just don't know if that's the reason that I heard.
10 That's what I'm saying.

11 Q What was the reason you heard?

12 A I heard that it had come up in the pretrial --

13 THE COURT: You may continue.

14 THE WITNESS: It had come up in the pretrial
15 conference that defense counsel wanted to potentially know how
16 many businesses there were and have them be taken out. That's
17 what I understood.

18 BY MR. FOSTER:

19 Q And you didn't just take out businesses, did you, from
20 36A -- or did you just take out businesses? Is that the only
21 thing you took out?

22 A No.

23 Q What else did you take out?

24 A I took the "phone to" calls.

25 Q On what basis did you take out the "phone to" calls?

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1 A The "phone to" calls, again, when I had performed the
2 analysis on 36, I realized that we were counting calls for --
3 if there was a phone 1 and a phone 2, we were counting that
4 twice. So essentially since in this case we're referring to
5 every line in the contact list as a single call, and I realized
6 that I hadn't personally read anything that said for sure that
7 defendant called phone 1 and phone 2.

8 So I kind of took it upon myself to be more accurate,
9 and as I mentioned, more conservative. So I talked to
10 plaintiff's counsel, and I explained that, you know, I didn't
11 have this knowledge, and I thought that while taking out the
12 businesses, that it would probably be a good idea to take out
13 phone 2, just to be on the safe side, in case defendant did not
14 call both phone numbers.

15 Q When you produced Exhibit 36 back in January, you produced
16 the underlying database that verified the call counts, the
17 disposition counts, and the summary of Exhibit 36; is that
18 correct?

19 A Not a database; again, the output.

20 Q Let me rephrase. You produced the CSB files that verified
21 your work that showed the names, numbers, the disposition
22 codes; isn't that correct?

23 A That's correct.

24 Q And you didn't produce that to us this time for
25 Exhibit 36A?

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1 A I did not personally, but I have not produced anything to
2 you myself.

3 Q Your firm didn't produce that. Neither did any of the
4 other law firms representing plaintiff produce the CSB files
5 that verified the work for 36A?

6 A I don't have knowledge personally of what they sent you.

7 Q You didn't produce the CSB files for the exhibit
8 underlying 36B, which was produced to us two days ago; isn't
9 that right?

10 A Isn't that the same question?

11 Q No, it's different.

12 A Can you rephrase so I understand?

13 Q You didn't produce the CSB files that supported your work
14 in Exhibit 36B, did you?

15 A Produced to who?

16 Q Us. Our firm. The defendant.

17 A I never produced anything directly to you.

18 Q Do you have any reason to believe those were produced?

19 A I am unclear.

20 Q Now, let's talk about the analysis you ran for 36B. Can
21 you explain that one more time? I caught something that you
22 were using Google to analyze some of the data. Would you
23 explain that again.

24 A Sure. So for 36B, I took the master list of all of the
25 contact lists, like I did before. This time I did not end up

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1 matching them against the KCC list at all. Instead I just
2 removed the businesses, and then I removed any invalid or
3 nonUnited States numbers.

4 Q You mentioned that you used some Google analytics to
5 analyze the data; is that correct, some third-party database?

6 A Yes. Google Analytics is a different product, but, yes, I
7 used a Google tool.

8 THE COURT: Do you know the name of the Google tool?

9 THE WITNESS: It is a Google library. It is called
10 like libphone, something.

11 BY MR. FOSTER:

12 Q Again, do you work for libphone or is that a database you
13 used?

14 A Well, that's just the name of the tool. It is made by
15 Google.

16 Q Did you make the tool?

17 A I did not make the tool.

18 Q You don't understand how that tool works, do you?

19 A Well, let me say this: What Google provided was actually
20 a software library. So Google ended up having a library that
21 contained all of the area codes that were valid and all of the
22 prefixes. Then what Google does is they say anyone can
23 basically use our library. So myself and one of my guys, who
24 is a computer forensic investigator at Edelson, basically made
25 software that ended up using that library. So I do have

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1 knowledge, yes.

2 Q Well, you utilized the library that you didn't create and
3 you don't know how it was created; is that correct?

4 A I wouldn't say that. I looked through the library, and I
5 looked and noticed that there were U.S. area codes and
6 prefixes. I performed spot checks on those as well.

7 Q My question was, you didn't create the library, and you
8 don't know what data was used to create that library, do you?

9 A I know what data was used to create it. I did not create
10 the library.

11 MR. FOSTER: Your Honor, we object to the entry of
12 Exhibits 36, 36A, and 36B.

13 THE COURT: I understand. I understand the
14 objection.

15 All right. Members of the jury, this is a perfect
16 time to end for the evening. We will start up at 9:00 a.m.
17 tomorrow. I think this case is going to be in your hands
18 tomorrow. So please do not discuss this case with anyone,
19 including among yourselves. Do not do any research. We have
20 had a lot of talk about Google. None of you can get on Google
21 tonight and look up anything. You will base this decision
22 based strictly on the evidence received during trial and the
23 instructions I give you. Please don't do any research.
24 Otherwise, we are starting this whole trial again.

25 So I will see you tomorrow morning at 9:00 a.m.

1 sharp. Have a good evening.

2 JUROR: Do we leave the books here?

3 MR. FOSTER: I will need it for cross.

4 THE COURT: Feel free to leave it on your chair or on
5 the floor. It will be used tomorrow morning, it sounds like.
6 But not your notebooks; your notebooks can go in the jury room.
7 The big, thick, heavy books, you don't need to carry them back
8 and forth. Leave them in the jury box.

9 Good night, everyone.

10 (Open court; jury not present:)

11 THE COURT: All right. Folks, I'm going to receive
12 in evidence Exhibit 36. I am going to exclude from evidence
13 36B. We have got the same problem with this Google tool
14 libphone as we do with SearchBug. It may very well be a
15 perfectly valid tool that's relied upon by experts in this
16 field, and this problem would have been solved had plaintiff
17 filed a Rule 26 expert disclosure report in a timely fashion
18 with an expert opinion that the Google tool libphone, or
19 whatever that is, and SearchBug are reliable and the sort of
20 tool that are used by experts in this field for these
21 calculations, but we don't have that. I can't take judicial
22 notice. I am not going to take judicial notice that the Google
23 tool libphone and/or SearchBug are reliable.

24 In addition, it needed to be provided in a more
25 timely fashion to defendant. I'm more concerned about the fact

1 that 36B uses this Google tool without expert testimony; that
2 it is reliable. So it's the same problem that I had with 36C.
3 So 36B is out. 36C, I already said, is out. 36 is in.

4 Now, with respect to 36A, let me ask you all some
5 questions. If I heard this correctly, counsel did provide the
6 CSB files to defendant that were used in the preparation of 36.

7 Did I understand that correctly, defense counsel?

8 MR. FOSTER: Yes, Your Honor. They provided the
9 files, and Mr. Franzini was kind enough to provide me with an
10 explanation of how those files were created and how the summary
11 was created.

12 THE COURT: Let me ask plaintiff's counsel, did you
13 provide the CSB files to defendant that relate to 36A?

14 MR. DOVEL: Your Honor, we did not. The reason we
15 did not, as you've noted, this is not expert testimony. The
16 rules are that we have to provide the underlying data, but we
17 do not have to provide the software that's used in crunching
18 the numbers or the keystrokes. That's the case law.

19 THE COURT: I agree. But here is the problem with
20 36A, if I've understood it correctly -- by the way, I'm not
21 worried about the KCC class list. The KCC class list is what
22 it is. It is just a group of names and numbers. Both sides
23 have it. All that we have with 36 and 36A is you take the big
24 group of data from the 405 contact lists, and you take and
25 filter it against the KCC class list. I'm just not worrying

1 about that.

2 But Mr. Davis did a second thing with respect to 36A.
3 One thing that he did was he only used the first phone number
4 in the KCC class list, and I don't know whether that was
5 explained to the defendant -- let me ask defendant. Was that
6 explained to you, that 36A basically used only the first phone
7 number in the KCC class list?

8 MR. FOSTER: No, Your Honor. What was explained to
9 us was, on Sunday, Mr. Franzini provided the spreadsheet, the
10 summary, and said that this summary is to address the
11 objections at Wednesday's pretrial conference. As you recall,
12 I don't believe that we mentioned the first phone number in the
13 KCC list, or, frankly, I don't think we raised the business
14 issue then.

15 THE COURT: I think I may have talked about the
16 business issue, and there was some talk about foreign area
17 codes or Canadian numbers.

18 But my two concerns now -- and I don't know what to
19 do about 36A. No. 1, if the defense wasn't given the CSB
20 files, then at the minimum they should have been told that not
21 only did the plaintiff apply the KCC class list, but they only
22 applied it against the first phone number, so that way the
23 defendant could have a fair opportunity to determine for itself
24 the accuracy of 36A. If you don't know how 36A is calculated,
25 you don't know how to assess whether or not it's accurate.

1 Secondly, there appears to be some subjective
2 judgment that I heard from Mr. Davis. He removed anything that
3 had the name "Inc." or "Incorporated" or "Corporation" or
4 "LLC," but I think those are just examples of maybe some other
5 things. I don't think we have a complete list of what he
6 removed, like, for example, I don't know whether he removed
7 "Limited, LTD." I don't know whether he removed "Company, Co."

8 MR. FOSTER: I don't know, Your Honor.

9 THE COURT: Then we heard that Mr. Davis also did a
10 check for last names that had more than 15 characters. I
11 totally understand the logic behind it. It makes perfectly
12 good sense, but we don't know exactly what criteria he applied
13 or perhaps, as an alternative for that, what names he took out
14 as a result.

15 And so had the CSB file that created 36A been given
16 to the defendants, the defendants then could have compared that
17 to 36. They could have seen what has been removed. They could
18 have seen that the second numbers from the KCC class list were
19 removed. They could have seen what business names were
20 removed. Now they know what goes into 36A, and they can
21 "have at" the summary witness, Mr. Davis, on whether or not 36A
22 is accurate.

23 Here is where the bottom line is for me: The idea
24 behind Rule 1006 is, No. 1, the underlying data -- well,
25 No. 1, the data needs to be voluminous. I'm satisfied. I have

1 said it before. This is voluminous data. No. 2, the
2 underlying voluminous data has to be admissible. I think
3 generally for 36 and 36A it is. 36B and 36C it's not -- I
4 don't have any evidence that I can conclude it's admissible,
5 because I don't have any expert testimony that the Google tool
6 libphone is the sort that's reasonably used by experts in this
7 field, or even by people generally in this field for this type
8 of calculation. And for 36C, I already have my same concern as
9 I did about SearchBug. So for 36B and C. I don't think that
10 we have the situation where the records being summarized are
11 all admissible or the tools to summarize them are all
12 admissible.

13 But then the third criteria is that the summary and
14 the underlying data has to be provided to the opposing party in
15 a sufficiently timely manner so that they can do their own
16 investigation and challenge whether the summary is accurate or
17 not. I'm going to come back to that in a moment.

18 Then I will say the fourth criteria that some courts
19 look at, but I don't think many do, is how accurate is the
20 summary itself. Here, I think that's better tested by
21 cross-examination. There may be an extreme case that it is so
22 unreliable that it is inadmissible. But for the most part if
23 you satisfy the first three prongs, it's voluminous, it's
24 admissible, and it has been timely provided, then we let how
25 accurate or inaccurate it is be tested by cross-examination. I

1 don't think any case ever says it has to be 100 percent
2 accuracy in order for a summary to be admitted under 1006.

3 But on this third prong of is it timely provided, I
4 understand it was provided on Saturday, April 6th, and it may
5 have been a different situation had plaintiff given the CSB
6 file and the list of all the specific types of business
7 entities and the specific criteria of what last names of more
8 than 15 characters were deleted, or even maybe just with the
9 CSB list. That probably would be enough, with an explanation
10 that we have taken out the second phone numbers from the KCC
11 class list, we've taken out what looks like to us to be
12 business names. You can compare the two lists themselves, and
13 you can see that.

14 Had the CSB list been provided in enough time to make
15 those comparisons to examine the summary expert, then I think
16 that would satisfy the third criteria. Whether or not three or
17 four days before trial is enough time, I don't know, and I
18 guess I don't have to decide, because as I hear plaintiff
19 confirming, the CSB files for 36A were not provided to the
20 defendant, and I just don't understand why not.

21 MR. DOVEL: I'll say, Your Honor, the reason why not.
22 We provided a summary to them, and we told them about it. And
23 if they wanted any more information, we were happy to provide
24 it. They never asked for it, Your Honor. They never asked for
25 anything else. We thought what we provided up to that point

1 was sufficient for them and that was all that was needed.

2 THE COURT: Well, did you provide to them, when you
3 gave them 36A, the statement or information that 36A only uses
4 the number 1 phone number from the KCC class list and not both
5 phone numbers?

6 MR. DOVEL: Let me have Mr. Franzini address that.
7 Can you rephrase the question?

8 THE COURT: Sure. As I understand it, 36 basically
9 looks to see whether either KCC class list phone number 1 or
10 phone number 2 -- sorry. Let me start that again.

11 As I understand it, 36 takes both phone number 1 and
12 phone number 2 from all of the gigantic contact lists, the 405
13 contact lists, including both phone number 1 and phone number
14 2; am I right?

15 I am looking at Mr. Davis.

16 THE WITNESS: Yes, you're right.

17 THE COURT: Then it asks which one of these are on
18 the KCC class list, and the starts counting just from that;
19 whereas 36A starts with a different foundation. It says that
20 we're only going to look at phone number 1 from the 405 contact
21 lists, and then compare that against the KCC class list.

22 Am I right, Mr. Davis?

23 THE WITNESS: Yes.

24 THE COURT: So when plaintiff's counsel gave 36A to
25 defense counsel, did they explain that to defense counsel,

1 Mr. Franzini?

2 MR. FRANZINI: I don't believe we said that in the
3 email. I know they are aware of it now, and, frankly, I don't
4 recall when it was explained to them.

5 THE COURT: So defense counsel is telling me that was
6 not told them. Am I correct, defense counsel?

7 MR. FOSTER: That's correct.

8 THE COURT: In the absence of a contrary statement,
9 I'll accept that.

10 In addition, I'm hearing Mr. Davis explain he took
11 out the names that are commonly associated with the business;
12 for example, Inc., Corp., and LLC. He looked at last names
13 that were more than 15 characters. And if it sounded like a
14 business to him, he took it out.

15 Am I right, Mr. Davis?

16 THE WITNESS: Yes.

17 THE COURT: And I'm taking it that the plaintiff
18 didn't explain that process to defense counsel and certainly
19 didn't give defense counsel sort of a comprehensive list of
20 what were the business name descriptors that were being removed
21 and/or what were the 15-plus-character last names that were
22 being removed. Am I right?

23 MR. FRANZINI: That's right, Your Honor, but if I
24 could add one thing to that.

25 THE COURT: Absolutely.

1 MR. FRANZINI: On the business issue, we told them
2 that we were removing the businesses, and then we gave them a
3 count of the businesses we removed. So just to take one step
4 back also, the summary exhibit, 36A, is based on the -- if you
5 took those CSB files that we already provided to them in
6 January, what is shown on Exhibit 36A is a subset of that
7 information. So it is not that we hadn't provided the
8 underlying data, except there is one additional missing link
9 that we didn't provide them.

10 THE COURT: So you gave them 36 with all the
11 underlying data in January of this year. 36A is simply a
12 smaller subset of that so that really if they think that 36 is
13 not a good summary, they can attack 36. Nothing was added to
14 36 that created 36A. 36A is just a smaller subset of 36; am I
15 right?

16 MR. FRANZINI: That's exactly right, Your Honor. So
17 we thought they already had the underlying data. In fact, I
18 don't know that we even needed to give them the CSB files for
19 the first batch in the first place. We just wanted to make
20 sure that any objection to this would be fleshed out early in
21 the process. That's why we did that.

22 THE COURT: I guess although I'm concerned on a
23 theoretical level that maybe not enough data was given on 36A,
24 an explanation. On the other hand, I don't see the prejudice
25 to defendant as being significant by not getting that for 36A.

1 So for better or for worse, we will let an appellate
2 court sort it out. 36 is received. 36A is received. 36B is
3 excluded. It is not received. 36C, as I have already said, is
4 excluded. It is not received.

5 All right. So we will pick up with Mr. Davis'
6 direct, I assume, tomorrow morning at 9:00?

7 MR. DOVEL: Yes, Your Honor.

8 THE COURT: Then does plaintiff anticipate resting?

9 MR. DOVEL: We are seeing if we can have another
10 witness, but we are not sure.

11 MR. O'NEAL: Who are you calling?

12 THE COURT: How are you going to do that when you
13 haven't listed a witness on a witness list?

14 MR. DOVEL: We have a witness, which is the
15 representative of ViSalus.

16 THE COURT: I see. So if a representative of ViSalus
17 steps into the courtroom, you're going to call him to the
18 stand?

19 MR. DOVEL: That's right, Your Honor.

20 THE COURT: All right. Fine. That will be
21 interesting to watch.

22 Okay. See you in the morning.

23 One more thing. This case is going to the jury
24 tomorrow. Are you prepared to give me any exceptions to jury
25 instructions and/or verdict form now, or would you like to meet

1 at 8:30 tomorrow morning and put those on the record then?

2 MR. DOVEL: 8:30 tomorrow, Your Honor.

3 MR. O'NEAL: Agreed, Judge.

4 THE COURT: Okay. 8:30 tomorrow. We will pick up
5 without the jury. I will expect everyone to give me their
6 further arguments, exceptions, and objections to final jury
7 instructions and verdict form.

8 See you tomorrow at 8:30.

9 (Court adjourned.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/ Dennis W. Apodaca
DENNIS W. APODACA, RDR, RMR, FCRR, CRR
Official Court Reporter

May 14, 2019
DATE

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